Docket for 04-1384

(48)

No. 04-1384
Title: June Carabell, et al., Petitioners
v.
United States Army Corps of Engineers, et al.
Docketed: April 15, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-1700)
Decision Date: September 27, 2004
Rehearing Denied: January 10, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 11 2005	Petition for a writ of certiorari filed. (Response due May 16, 2005)
May 11 2005	Order extending time to file response to petition to and including June 15, 2005.
May 13 2005	Brief amicus curiae of National Association of Home Builders filed.
May 16 2005	Brief amici curiae of John A. Rapanos and Pacific Legal Foundation filed.
Jun 15 2005	Brief of respondents United States Army Corps of Engineers, et al. in opposition filed.
Aug 17 2005	Reply of petitioners June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker filed.
Sep 14 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 11 2005	Petition GRANTED The case is consolidated with No. 04-1034 and a total of one hour is allotted for oral argument.
Oct 26 2005	Motion to deconsolidate the cases, or in the alternative, for divided argument filed by petitioners. VIDED.
Nov 7 2005	The motion of petitioners to deconsolidate the cases is denied. The motion of petitioners for divided argument is granted to be divided as follows: 20 minutes for petitioners in No. 04-1034; 20 minutes for petitioners in No. 04-1384; 40 minutes for respondents. VIDED.
Nov 17 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 2, 2005. VIDED.
Nov 17 2005	Extension of time within which to file the respondents' briefs on the merits to and including January 13, 2006. VIDED.
Nov 23 2005	Letter from amici curiae Foundation for Environmental and Economic Progress, et al. proposing to lodge copies of administrative materials. VIDED.
Nov 25 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Nov 30 2005	SET FOR ARGUMENT on Tuesday, February 21, 2006.
Dec 1 2005	Motion for leave to file amicus brief filed by Donald Harkins. VIDED.
Dec 2 2005	Brief amicus curiae of National Association of Home Builders filed. VIDED.
Dec 2 2005	Brief amici curiae of International Council of Shopping Centers, et al. filed. VIDED.
Dec 2 2005	Brief amicus curiae of American Petroleum Institute filed. VIDED.
Dec 2 2005	Brief amici curiae of Croplife America, et al. filed. VIDED.
Dec 2 2005	Brief amicus curiae of National Federation of Independent Business Legal Foundation filed. VIDED.
Dec 2 2005	Brief of petitioners June Carabell, et al. filed.
Dec 2 2005	Joint appendix filed.

Dec 2 2005	Brief amicus curiae of John J. Duncan, Jr. filed. VIDED.
Dec 2 2005	Brief amici curiae of Charles R. Johnson, et al. filed. VIDED.
Dec 2 2005	Brief amici curiae of American Farm Bureau Federation filed. VIDED.
Dec 2 2005	Brief amicus curiae of Western Coalition of Arid States filed. VIDED.
Dec 2 2005	Brief amicus curiae of Attainable Housing Alliance filed. VIDED.
Dec 2 2005	Brief amici curiae of Pulte Homes, Inc., et al. filed. VIDED.
Dec 2 2005	Brief amicus curiae of Mackinac Center for Public Policy filed. VIDED.
Dec 2 2005	Brief amici curiae of Alaska, et al. filed. VIDED.
Dec 2 2005	Brief amicus curiae of National Association of Waterfront Employers filed. VIDED.
Dec 2 2005	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
Dec 2 2005	Brief amici curiae of National Stone, Sand and Gravel Association, et al. filed. VIDED.
Dec 2 2005	Brief amicus curiae of Mountain States Legal Foundation filed. VIDED.
Dec 2 2005	Brief amicus curiae of Home Builders Association of Central Arizona filed. VIDED.
Dec 2 2005	Brief amici curiae of Foundation for Environmental and Economic Progress, et al. filed. VIDED.
Dec 9 2005	CIRCULATED.
Dec 16 2005	Motion for leave to file amicus brief out of time filed by Jerome B. Carr, Ph.D. VIDED. (Distributed)
Dec 29 2005	Brief amicus curiae of Calvin H. Johnson filed. VIDED. (Distributed)
Jan 9 2006	Record received from USCA - 6th Circuit. (1 binder)
Jan 12 2006	Brief amici curiae of Ducks Unlimited, Inc., et al. filed. VIDED. (Distributed)
Jan 12 2006	Brief amici curiae of Jared Diamond, et al. filed. VIDED. (Distributed)
Jan 12 2006	Brief amicus curiae of City of New York, NY filed. VIDED. (Distributed)
Jan 13 2006	Brief of respondents United States Army Corps of Engineers, et al. filed. (Distributed).
Jan 13 2006	Brief amicus curiae of Chesapeake Bay Foundation filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of Western Organization of Resource Councils, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amicus curiae of Environmental Law Institute filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of New York, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of Carol M. Brower, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of American Rivers, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amicus curiae of American Planning Association filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of John D. Dingell, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amici curiae of Association of State Wetland Mangers, et al. filed. VIDED. (Distributed)
Jan 13 2006	Brief amicus curiae of National Mitigation Banking Association. filed. VIDED. (Distributed)
Jan 13 2006	Brief amicus curiae of Association of State and Interstate Water Pollution Control Administrators filed. VIDED. (Distributed)
Jan 13 2006	Brief amicus curiae of Macomb County, MI filed. (Distributed)
Jan 13 2006	Brief amici curiae of Ecological Society of America, et al. filed. (Distributed)
Jan 18 2006	Record received from U.S.D.C. Eastern District of Michigan (Detroit). (3 boxes)

Feb 14 2006	Reply of petitioners June Carabell, et al. filed. (Distributed)
Feb 17 2006	Motion for leave to file amicus brief filed by Donald L. Harkins GRANTED.
Feb 17 2006	Motion for leave to file amicus brief filed by Jerome B. Carr, Ph.D. DENIED.
Feb 21 2006	Argued. For petitioners in No. 04-1034: M. Reed Hopper, Sacramento, Cal. For petitioners in No. 04-1384: Timothy A. Stoepker, Detroit, Mich. For respondents: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
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No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

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PETITION FOR WRIT OF CERTIORARI

June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 391 F.3d 704 (6th Cir. 2004), Appendix 1a-13a. The order of the district court, Appendix 15a-17a, which adopts and incorporates the report and recommendation of the magistrate judge, Appendix 20a-57a, was reported at 257 F. Supp. 2d 917 (E.D. Mich. 2003). The decision of the United States Army Corps of Engineers (the Corps) on Petitioners' administrative appeal was not published but is attached as Appendix 58a-68a. The Corps' initial administrative decision was not published but is attached as Appendix 69a-76a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 27, 2004. That court's denial of the Petition for Rehearing En Banc was entered on January 10, 2005, Appendix 18a-19a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides, in relevant part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (7) The term "navigable waters" means the waters of the Untied States, including territorial seas.

33 U.S.C. § 1362(7) (CWA § 502(7)).

Federal regulations define "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be

susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).

INTRODUCTION

In *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court held that federal authority under § 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), extends only to waters or wetlands that have a "significant nexus" with the navigable waters of the United States. *SWANCC*, 531 U.S. at 167. Since that decision, federal courts have struggled to define the precise nature of that "significant nexus," especially with respect to wetlands that are adjacent to waters covered by the Act. In this case, the Sixth Circuit has issued an opinion defining the scope of federal authority over adjacent wetlands that fundamentally departs from the principle that this Court set forth in *SWANCC*, as well as from the decisions of the overwhelming majority of federal circuit and district courts.

Petitioners own a parcel of land (the Property) that includes a wetland, which has no surface or ground water connection with any "waters of the United States." The lower courts held that the Property was subject to federal authority, rejecting Petitioners' contention that a "significant nexus" between a water

and a wetland exists where there is, at a minimum, a hydrological connection.

The lower courts rulings' conflict with the overwhelming majority of federal courts, which have held that that there is no "significant nexus" between a wetland and a navigable water in the absence of a hydrological connection. In *SWANCC*, this Court emphasized that the scope of federal authority under the Act was ultimately defined by the Act's expressed purpose of restoring and maintaining "the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (quoted in *SWANCC*, 531 U.S. at 166). On this basis, *SWANCC* held that the Act could not be interpreted to support a regulation, the "Migratory Bird Rule," that purported to extend federal authority over isolated, intrastate ponds. The majority of federal courts have recognized that, under this principle, the Act cannot be extended to hydrologically isolated wetlands.

In the alternative, to the extent that the Corps' interpretation of the intended scope of the Act is correct, this Court's recent Commerce Clause jurisprudence prohibits such an expansive exercise of federal authority. Allowing federal jurisdiction over isolated intrastate wetlands significantly intrudes upon the states' traditional position as the primary source of authority for the regulation of land and water use, and this Court should hold that the Act exceeds Congress' authority under the Commerce Clause insofar as it permits the regulation of hydrologically isolated wetlands, such as the wetland on the Property.

Resolving the conflict in this case by explicating the concept of "significant nexus" will also contribute to the resolution of another conflict among the circuits regarding whether the "significant nexus" requirement limits federal authority to wetlands that are adjacent to navigable waters or to wetlands, such as the one in this case, that are adjacent to a non-navigable tributary of a navigable water. *See* Appendix at 10a (citing cases). When the conflict created in this case is viewed in light of this other, conceptually similar conflict about federal authority over "adjacent wetlands," it is clear that the federal courts require this Court's further guidance about the precise nature of the "significant nexus" requirement described in *SWANCC*.

STATEMENT OF THE CASE

The Property is 19.6 acres of land in Chesterfield Township, Macomb County, Michigan, about a mile from Lake St. Clair. *See* Appendix at 2a. Approximately fifteen acres of the Property are forested wetlands. *Id.* A drainage ditch is located on an adjacent parcel and is near one of the borders of the Property. Appendix at 2a-3a. A berm runs along the side of the ditch, forming a barrier between the Property and the ditch and preventing water from the Property from draining into the ditch. Appendix at 3a. The berm was apparently formed more than fifty years ago by the side casting of spoils during the excavation of the ditch. Appendix at 62a. There is no dispute in the administrative record that surface water does not flow between the Property and the ditch. *See* Appendix at 3a. Similarly, there is no dispute that there is no groundwater connection between the Property and the ditch. *See* Appendix at 52a. The ditch

intersects with the Sutherland-Oemig Drain, which empties into Auvase Creek, which flows into Lake St. Clair. Appendix at 3a. Petitioners seek to use the Property for the construction of a condominium complex. Appendix at 2a.

A. The Administrative Decisions

After the Michigan Department of Environmental Quality (MDEQ) issued a permit authorizing Petitioners' project, Respondent United States Environmental Protection Agency (EPA), acting pursuant to § 404(a) of the Clean Water Act, 33 U.S.C. § 1344, objected to the issuance of the state permit and required Petitioners to file an application for a federal permit to fill the wetland. Appendix at 4a. The EPA also authorized the Corps to rule on the application. *Id.* The Corps denied the application, finding that the wetland on the Property was part of the Lake St. Clair watershed and therefore that the wetland was governed by the Act. Appendix at 69a-76a. This decision was affirmed through the Corps' internal administrative appellate process. Appendix 58a-68a.

B. The District Court Decision

Petitioners challenged the Corps' decision in the district court. Ruling on the parties' cross-motions for summary judgment, the district court adopted the report and recommendation of a magistrate judge and ruled that the Corps was correct in asserting jurisdiction over the wetland. Appendix at 20a-57a. The district court acknowledged that, in *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this

Court had ruled that the Act regulated only those waters that had a "significant nexus" with the "waters of the United States, and it concluded that the wetland on the Property had such a "significant nexus" and that the Property "is in fact not isolated, and is subject to the jurisdiction of the [Clean Water Act]. Appendix at 49a. But the district court did not identify what constituted the "significant nexus" in this case, nor did it address the significance, if any, of the undisputed fact that the wetland lacked any hydrological connection with any of the "waters of the United States."

C. The Sixth Circuit Opinion

On appeal, the Petitioners reiterated their argument that the Property was not subject to federal jurisdiction under the Clean Water Act because it did not have a significant nexus with a federal water. The Sixth Circuit rejected this argument by concluding that the physical adjacency of the Property to a tributary of a federal water was sufficient to create federal jurisdiction. Appendix at 12a. The Sixth Circuit began its analysis by noting that the Corps' interpretation of its own regulations was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Appendix at 6a-7a. Applying 33 C.F.R. § 328.3(a)(7), the Sixth Circuit reasoned that the existence of the berm separating the Property from the drainage ditch did not prevent federal jurisdiction because, under that regulation, the definition of "adjacent wetlands" includes a wetland that is separated by a berm or man-made barriers from a tributary of federal waters. Appendix at 9a. The Sixth Circuit then noted that this reading of § 328.3(a)(7) was not affected by this Court's decision in

SWANCC. Appendix at 10a. According to the Sixth Circuit, most federal circuit courts, with the exception of the Fifth Circuit, have held that *SWANCC* should be narrowly applied, only precluding federal jurisdiction over isolated waters. *Id.* (citing cases). Thus, the Sixth Circuit concluded that this Court's decision in *SWANCC* did not alter the broad definition of "adjacent wetlands" that the Sixth Circuit found in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). Appendix at 10a-12a. Under that definition, the Sixth Circuit held that the district court did not err in finding that the Property did not contain isolated wetlands and that it had a "significant nexus" with federal waters. Appendix at 12a. In reaching this holding, the Sixth Circuit, like the district court, did not, however, precisely explain what characteristic of the Property provided this "significant nexus." *See id.*

REASONS FOR GRANTING THE PETITION

I

THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL AUTHORITY UNDER SECTION 404(a) OF THE ACT EXTENDS TO WETLANDS THAT LACK ANY HYDROLOGICAL CONNECTION TO A NAVIGABLE WATER OR A TRIBUTARY OF A NAVIGABLE WATER

The Sixth Circuit's decision in this case creates a new conflict among the circuit courts and deepens an existing conflict, both of which relate to the scope of federal authority over "adjacent wetlands" under § 404(a) of the Clean Water Act. As the Corps conceded here when it moved for the publication of the

Sixth Circuit's opinion, the decision here makes new law; it is the first decision by any circuit court concluding that the federal authority created by § 404(a) extends to a wetland despite the absence of any direct or indirect hydrological connection establishing the "significant nexus" between that wetland and any navigable water. The conflict created in this case overlays an existing conflict between the Fifth Circuit and other circuits, regarding whether this Court's decision in *SWANCC* requires that federal jurisdiction over wetlands is restricted to those wetlands that are adjacent to waters that are actually navigable. These conflicts require that this Court grant a writ of certiorari and clarify the scope of federal jurisdiction under § 404 with respect to adjacent wetlands.

Since this Court's opinion in *SWANCC*, the overwhelming majority of federal circuit and district courts have held that § 404(a) extends federal authority over wetlands when there is, at a minimum, a hydrological connection between those wetlands and federal waters. This jurisdictional principle is perfectly consistent with the fundamental purpose of the Act, as expressed in the Act itself and as recognized by this Court in *SWANCC*. *SWANCC*, 531 U.S. at 166 (citing 33 U.S.C. § 1251(a)). A wetland will have an effect on the "chemical, physical, and biological integrity" of the waters of the United States only when water from that wetland actually mingles with the waters of the United States through a hydrological connection. In the absence of such a connection, the wetland is isolated from federal waters and will not have any direct causal effect on the integrity of the waters of the United States. Consequently, the wetland on the Property is

not properly subject to the federal authority created by the Act.

The Fourth Circuit has repeatedly held that federal authority under the Act is limited to adjacent wetlands that have a hydrological connection to federal waters. In *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the Fourth Circuit considered whether there was a "significant nexus" between a wetland and navigable waters via a surface-water connection between the wetland and non-navigable tributaries of Chesapeake Bay. The Fourth Circuit answered this question in the affirmative, even though the hydrological connection was effected intermittently through man-made roadside ditches as well as through natural bodies of water. Despite its tenuous character, the hydrological connection itself was the foundation of the Fourth Circuit's conclusion that federal authority could lawfully be extended over the wetland. The Fourth Circuit reached an essentially identical conclusion on the basis of essentially identical reasoning in *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

In two opinions issued before the opinion at issue, even the Sixth Circuit indicated that finding a hydrological connection between wetlands and navigable waters is the crucial factor in determining whether those wetlands have the requisite "significant nexus" to warrant federal jurisdiction under § 404(a). *See United States v. Rapanos*, 376 F.3d 629 (2004)[1]; *United States v. Rapanos*, 339 F.3d 447 (2003), *cert.*

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[1] A petition for a writ of certiorari was filed in this case on January 28, 2005. It is docketed in this Court as Case No. 04-1034.

denied, 541 U.S. 972 (2004). These two cases, one civil and one criminal, arose from a property owner's decision to drain wetlands on his property, which was located at least eleven miles from the nearest navigable water but was connected to that water by the flow of surface water through several different non-navigable bodies of water. In the criminal case, which was decided first, the Sixth Circuit pointed out that "[t]he evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two." *Rapanos*, 339 F.3d at 453. Similarly, in the civil case, which was decided slightly more than two weeks before this case was argued in the Sixth Circuit, the court rejected the property owner's argument that "direct abutment" was required to invoke CWA jurisdiction, holding that "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke [Clean Water Act] jurisdiction." *Rapanos*, 376 F.3d at 642.

Other courts, ruling before and after *SWANCC*, have concluded that the Act extends to wetlands that have, at the very least, a hydrological connection to the "waters of the United States. *See, e.g., United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 120-21 (E.D. Mich. 1981).

In addition to the cases that directly address the question of federal authority over wetlands, there are

other cases that are consistent with the proposition that federal authority under the Act extends to only to those waters that have a hydrological connection with one of the "waters of the United States." In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), the Ninth Circuit concluded that agricultural irrigation canals were not isolated because they exchanged water with tributaries of navigable waters. *Headwaters*, 243 F.3d at 533. In *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001), the district court conducted an essentially identical analysis, concluding that a non-navigable tributary was subject to federal authority under the Act by virtue of the fact that it had a hydrological connection with a navigable water, even though that connection involved the flow of surface water over a pasture.

The Sixth Circuit's opinion in this case marks a dramatic departure from the manner in which all of these federal courts have understood the meaning of "significant nexus." Instead of focusing its jurisdictional analysis whether there was a hydrological connection between the Property and any navigable water or tributary of a navigable water, the Sixth Circuit focused instead on the Property's physical proximity to the drainage ditch that was connected to non-navigable tributaries of Lake St. Clair. Appendix at 9a. Although the Sixth Circuit recognized that the identification of a "significant nexus" was essential to the definition of the scope of federal authority, the court presumed that such a nexus could be established simply by physical proximity. Appendix at 9a-12a. In so doing, the Sixth Circuit did not address the fact that so many other courts had concentrated on the centrality of a hydrological connection or on the fact

that, in the *Rapanos* cases, the Sixth Circuit itself defined the scope of federal authority in terms of the existence of a hydrological connection.

Only one other court has held that federal jurisdiction under § 404 may be found over an adjacent wetland despite the absence of a hydrological connection and solely on the basis of physical proximity. In *Baccarat Fremont Developers v. United States Army Corps of Eng'rs*, 327 F. Supp. 2d 1121 (N.D. Cal. 2003), the district court held that a wetland would still be considered adjacent to federal waters if it was separated from those waters by a man-made barrier. It concluded that *SWANCC* was not directly relevant to the construction of the concept of adjacency, and that there was no need to find the existence of a hydrological connection as a basis for concluding that a wetland was "adjacent" for the purposes of 33 C.F.R. § 328.3(a)(7). *Baccarat Fremont Developers*, 327 F. Supp. 2d at 1127-28; *see also Northern California River Watch v. City of Healdsburg*, 2004 WL 201502, *9 (N.D. Cal. Jan. 23, 2004) (asserting that "*SWANCC* did not impose a rule of 'hydrological connection' . . . .").

The conflict among federal circuit and district courts regarding the scope of federal authority over adjacent wetlands is related to a similar conflict between different circuits about the consequences of *SWANCC*. That conflict turns on the question whether federal authority over adjacent wetlands is limited to wetlands adjacent to bodies of navigable water. In both *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *In re Needham*, 354 F.3d 340 (5th Cir. 2003), the Fifth Circuit primarily addressed a question of the scope of federal authority under the Oil Pollution Act,

but, in so doing, it also made clear conclusions about the scope of federal authority under the CWA. The Fifth Circuit looked to *SWANCC* for general guidance about the scope of federal authority to regulate an oil spill into the non-navigable tributaries of navigable waters, and it concluded that the fundamental principles set forth in *SWANCC* limited federal authority generally to navigable waters or to bodies of non-navigable water that were immediately adjacent to navigable waters. *Rice*, 250 F.3d at 269; *Needham*, 354 F.3d at 345-46. In particular, the *Rice* court focused upon this Court's assertion in *SWANCC* that "'in order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.'" *Rice*, 250 F.3d at 269 (quoting *SWANCC*, 531 U.S. at 168)). As explained by the Sixth Circuit in this case, the Fifth Circuit's holding is directly contrary to holdings by the Fourth and Sixth Circuits, both of which have held that federal authority under the Act can be extended to wetlands that are adjacent to non-navigable tributaries of navigable waters. Appendix at 10a (citing *Deaton* and *Rapanos*, *supra*).

All of these divergent rulings by the federal district and circuit courts demonstrate that there is substantial confusion about how this Court's opinion in *SWANCC* has generally affected the analysis of the scope of federal authority under § 404(a) and, in particular, about what precisely constitutes the "significant nexus" that is required for the exercise of federal authority under the Act. By issuing a writ of certiorari in this case, and by ruling on the question whether a hydrological connection is essential to finding

a "significant nexus," this Court can resolve this confusion and clarify the meaning and proper application of *SWANCC*.

II

THE EXTENSION OF FEDERAL JURISDICTION UNDER § 404(a) TO ANY WETLAND THAT IS ONLY PHYSICALLY PROXIMATE TO A FEDERAL WATER IS INCONSISTENT WITH THIS COURT'S HOLDING IN *SWANCC* AND WITH THE LIMITS OF FEDERAL AUTHORITY UNDER THE ACT

This Court's decision in *SWANCC* established that the Act only provided federal authority for the purpose of restoring and maintaining "'the chemical, physical, and biological integrity of the Nation's waters'" and that the federal regulation of isolated, intrastate waters does not serve this purpose. When a wetland lacks a hydrological connection with any navigable water or tributary of a navigable water, it is isolated precisely as the man-made ponds in *SWANCC* were. Because the extension of federal authority to an isolated wetland will not advance the statutory purposes of the Act, such a wetland cannot be regulated by the Act.

This Court first addressed the general question of how wetlands fit into the bounds of regulatory authority under the Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, this Court began by noting the most fundamental purpose of the Act: maintaining and improving water quality. *Riverside Bayview*, 474 U.S. at 132. In light of this purpose, this Court acknowledged that, as the Corps had concluded in drafting its regulations, federal

authority under the Act must extend beyond navigable waters and include wetlands that are "integral parts of the aquatic environment." *Riverside Bayview*, 474 U.S. at 135. To decide what constituted an "integral part of the aquatic environment," the Court cited certain regulations promulgated under the Act, which identified three crucial functions for wetlands: (1) filtering and purifying water that drained into adjacent bodies of water; (2) slowing the flow of surface water runoff into lakes, rivers, and streams, as a means of preventing flooding and erosion; and (3) serving significant biological functions, including food chain production, habitat and nesting. *Riverside Bayview*, 474 U.S. at 134 (citing 33 C.F.R. § 320.4(b)(2)). Thus, this Court concluded that federal authority under the Act extended to any wetlands that were adjacent to navigable waters because such wetlands would serve these functions. *Riverside Bayview*, 474 U.S. at 135. But this conclusion was limited. This Court specifically pointed out that it was not ruling on the question whether federal authority under the Act extended to wetlands that were not adjacent to bodies of open water. *Riverside Bayview*, 474 U.S. at 131 n. 8.

Although *Riverside Bayview* identified fundamental principles that were necessary to determining whether and to what extent the Act covered wetlands adjacent to non-navigable waters, its holding was modified by this Court's decision in *SWANCC*, which clarified the scope of federal authority under the Act. In *SWANCC*, this Court considered the legality of one of the regulations promulgated by the Corps under the Act, the so-called "Migratory Bird Rule."

The Migratory Bird Rule defined "waters of the United States" to include any water that served or that might serve as a habitat for migratory birds or endangered species. *SWANCC*, 531 U.S. at 164 (discussing 51 Fed. Reg. 41217). The Corps defended this regulation as being properly within the scope of the Act's authority because the protection of such habitats was necessary for the preservation of the ecological integrity of aquatic ecosystems. *See id.* The Corps also contended that Congress had acquiesced in the Corps' interpretation of the scope of the Act's authority. *SWANCC*, 531 U.S. at 168-69. In this respect, the Corps' position was consistent with the assertion in *Riverside Bayview* that the Act purported to regulate waters for ecological purposes, particularly the protection of food chain production and biological habitats. *See Riverside Bayview*, 474 U.S. at 134-35.

This Court rejected the Corps' position that the Act permitted the regulation of intrastate waters solely for the purpose of protecting ecological connections between those intrastate waters and waters of the United States, and, therefore, it held that the Corps' promulgation of the Migratory Bird Rule exceeded the authority created by the Act. *SWANCC*, 531 U.S. at 171-72. The foundation of this Court's reasoning was that the animating purpose of the Act was to protect waters and aquatic ecosystems, including wetlands, that had a "significant nexus" with navigable waters. *SWANCC*, 531 U.S. at 167. Consequently, this Court held that wetlands were subject to regulation under the Act to the extent that they were "'inseparably bound up'" with the "waters of the United States." *Id.* (quoting *Riverside Bayview*, 474 U.S. at 134).

In so holding, this Court limited the holding of *Riverside Bayview* to the extent that *Riverside Bayview* held that federal jurisdiction could be based upon a purely ecological connection between a wetland and a navigable water. Indeed, in his dissenting opinion, Justice Stevens concluded that the majority's opinion in *SWANCC* had precisely this effect on the holding of *Riverside Bayview*. *See SWANCC*, 531 U.S. at 176 n. 2 (Stevens, J., dissenting). After *SWANCC*, this Court's opinion in *Riverside Bayview* can only be read to hold that wetlands are subject to regulation under the Act to the extent that they are "inseparably bound up" with the "waters of the United States."

The wetlands that meet this condition are those that, at a minimum, have a hydrological connection with the waters of the United States. A wetland that lacks such a hydrological connection, such as the one at issue in this case, has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*, which were found to be outside of the scope of the Act's authority. If there is pollution in a wetland that has a hydrological connection to those waters, the waters of the United States may be affected, and, therefore, the federal government has a legitimate interest in controlling such pollution. By contrast, however, there can be no legitimate federal interest in wetlands that lack any hydrological connection with waters of the United States because the condition of such wetlands is a purely intrastate matter. Indeed, the federal regulation of hydrologically isolated wetlands would disturb the states' power to be the primary source of authority over the use and development of land and water resources, which, as this Court recognized, the Act expressly recognized and

preserved. *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)).

As noted in the previous section, the overwhelming majority of federal courts have concluded that, in light of *SWANCC*, the federal authority to regulate wetlands under the Act extends only to wetlands that have a hydrological connection with the waters of the United States. In all of these cases, courts have focused on finding the existence of such a connection as a prerequisite for determining federal jurisdiction. *See, e.g., United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Rapanos*, 376 F.3d 629 (2004); *United States v. Rapanos*, 339 F.3d 447 (2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001). Even in cases decided before *SWANCC*, the overwhelming majority of courts conducted the same analysis as a basis for determining the scope of federal authority over wetlands. *See, e.g., United States v. Banks*, 115 F.3d 916, 920-21 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 121 (E.D. Mich. 1981).

The Fifth Circuit has gone further than these courts in its understanding of how this Court's opinion in *SWANCC* limited the scope of federal authority under the Act. It has held that *SWANCC* limited federal authority to wetlands that are adjacent to navigable waters. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *In re Needham*, 354 F.3d

340 (5th Cir. 2003). The Fifth Circuit expressed the principle this way: "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. Even though this reading of *SWANCC* imposes a more restrictive interpretation of the Act, it is nevertheless consistent with the proposition that *SWANCC* eliminated an ecological connection as a basis for defining the limits of federal authority and required an immediate connection between wetlands and waters of the United States, such that pollution in the wetlands would have a direct effect on the quality of federal waters.

The Sixth Circuit's opinion in this case is contrary to all of this federal authority, and, most importantly, to this Court's opinion in *SWANCC* because it concluded that the Property was within the Corps' jurisdiction under the Act without finding that there was a hydrological connection between the Property and any other body of water, navigable or non-navigable. Indeed, the record in this case made it impossible for the Sixth Circuit to find the existence of a hydrological connection. There was no evidence of any hydrological connection between the Property and any tributary of Lake St. Clair, and, in making its own findings, even the Corps determined that the Property "'is not part of the [Sutherland-Oemig Drain] watershed.'" Appendix at 52a (quoting the Corps' evaluation of Petitioners' permit application). Nevertheless, the Sixth Circuit concluded that, because the Property was physically adjacent to a drainage ditch that was a tributary to a navigable water, the

Property met the regulatory definition of "adjacent wetland." *Id.*

Given the record upon which its decision rested, the Sixth Circuit's ruling can be interpreted in one or both of two ways, neither of which is consistent with this Court's decision in *SWANCC*. First, it may reflect the conclusion that an ecological (as opposed to a hydrological) connection between a wetland and a navigable water is a sufficient basis for federal authority under the Act. In its own fact-finding and decision-making at the administrative level, the Corps devoted substantial attention to the ecological importance of the wetland on the Property. For example, in its decision letter, the first reason that the Corps gave for denying Petitioners' permit application was that "[y]our parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms." Appendix at 73a. In addition, the Corps asserted that Petitioners' permit should be denied because "[t]he minimization of impacts to these wetlands is important for conservation and the overall ecology of the region." Appendix at 74a. It is not surprising that the Corps should have concentrated so intently on ecological considerations because its decision was made in October 2000, before this Court's decision in *SWANCC*. But such an emphasis on ecological factors as a foundation for federal authority is simply inconsistent with the reasoning that supported this Court's invalidation of the Migratory Bird Rule.

Second, the Sixth Circuit's decision may be interpreted to reflect the conclusion that physical proximity alone is sufficient to establish the "significant

nexus" required by *SWANCC*. The Sixth Circuit's decision was based upon its conclusion that it was required to defer to the Corps' interpretation and application of its own regulations in accordance with *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Appendix at 6a-7a. Given this deference, the Sixth Circuit apparently decided that it was only required to determine whether the Property fit within the regulatory definition of "adjacent wetland" and that it was not required to examine whether that regulatory term and the Corps' application of it were consistent with the authority conferred by the Act. This approach conflicts with this Court's decision in *SWANCC*, where this Court pointed out that *Chevron* deference is not warranted when there is a question about whether an agency has exceeded the scope of the statutory authority under which it operates. *SWANCC*, 531 U.S. at 172. Because, as demonstrated above, physical proximity is not enough, in itself, to satisfy *SWANCC*'s "significant nexus" requirement, the Sixth Circuit erred in basing its jurisdictional analysis solely on its finding that the Property was adjacent to a tributary of a navigable water.

By correcting the Sixth Circuit's errors and reversing its judgment, this Court can clarify the precise nature of what constitutes a "significant nexus" between wetlands and the waters of the United States. Given this Court's ruling in *SWANCC*, and given the overwhelming weight of federal authority since that ruling, this Court should conclude that a "significant nexus" between a wetland and the waters of the United States requires, at a minimum, a hydrological connection between them. This construction of the

"significant nexus" requirement is consistent with the Act's objectives of controlling pollution in the waters of the United States and of preserving the traditional federal-state balance regarding the regulation of land and water. Moreover, this construction will not only resolve the conflict among the circuit courts that was created by the Sixth Circuit's decision here; it will also resolve the conflict between the Fifth Circuit and the other circuit courts regarding whether federal authority under the Act extends only to wetlands adjacent to navigable waters.

III

THE EXTENSION OF FEDERAL JURISDICTION UNDER § 404(a) TO ANY WETLAND THAT IS ONLY PHYSICALLY PROXIMATE TO A FEDERAL WATER IS PROHIBITED BY THE LIMITS ON CONGRESSIONAL AUTHORITY ESTABLISHED BY THE COMMERCE CLAUSE

In addition to being inconsistent with the fundamental purposes of the Act, the Sixth Circuit's reading of § 404(a) and its attendant regulations is also inconsistent with the limitations on federal legislative power that are established by the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. As this Court suggested in *SWANCC*, the extension of federal authority to isolated, intrastate waters upsets the traditional balance between the state and federal governments regarding the regulation of land and water. Consequently, regardless of what Congress may have purported with respect to the Act, the Act cannot be interpreted or applied to provide for the federal

regulation of wetlands that lack any substantial effect on interstate commerce.

Because Congress enacted the Clean Water Act pursuant to its Commerce Clause authority, the scope of jurisdiction under the Clean Water Act is limited to waters that have some substantial connection to interstate commerce. In other words, the Clean Water Act regulates aquatic ecosystems that have an effect on interstate waters. *See SWANCC*, 531 U.S. at 172. In *United States v. Lopez*, 514 U.S. 549 (1995) and its progeny, including *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed conceptions of what constitutes a substantial connection to interstate commerce. Thus, the *Lopez* line of cases is crucially relevant to the determination of when and to what extent a wetland can ever be found to have a substantial effect on interstate commerce. *See* Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980 (2000).

As this Court reaffirmed in *Lopez*, the core principle that defines the scope of congressional authority under the Commerce Clause is that such authority only extends to matters having a "'substantial economic effect'" on interstate commerce. *Lopez*, 514 U.S. at 556-57 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). Accordingly, this Court has repeatedly held that the Commerce Clause authorizes Congress to regulate "three broad categories of activity:" (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3)

the power to regulate those activities having a substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558-559. In order to determine which activities fall within the last category, a court must further examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute's language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends. *Lopez*, 514 U.S. at 563-64. These standards purport to assure that the federal government's powers will not become co-extensive with the general regulatory powers of the states, and legislation must not be interpreted or applied to compromise these standards. *See SWANCC*, 531 U.S. at 172.

The Sixth Circuit's reading of the scope of federal authority under § 404(a) is inconsistent with these limitations on federal authority under the Commerce Clause. The regulation of wetlands, such as the wetlands on the Property, obviously does not involve a regulation of the channels or instrumentalities of interstate commerce. There is no suggestion that the wetland on the Property is used in any way as a medium of interstate commerce. Consequently, the regulation of wetlands can only be justified to the extent that such wetlands have a substantial effect on interstate commerce. But wetlands that lack any hydrological connection to the waters of the United States do not have a substantial connection to interstate commerce in terms of the three factors identified in *Lopez*. First, the drainage or filling of wetlands does not relate to an economic activity.

Under § 404(a), it is unlawful to drain or fill a wetland for any reason or in connection with any activity, economic or not. Second, there is nothing in § 404(a) or the regulations promulgated under it constituting a "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." Nothing in the Act itself or in its attendant regulations would give the Corps or any other federal agency a method for distinguishing between wetlands that would have an effect on interstate commerce and wetlands that would not. Finally, there is no rationale for permitting the extension of federal authority under the Act to wetlands without any hydrological connection to the waters of the United States. As noted above, such regulation will not protect the integrity of waters of the United States because the absence of a hydrological connection assures that any harmful effects to the wetland will not be communicated to the waters of the United States. In short, wetlands without a hydrological connection to the waters of the United States are isolated from federal waters and, therefore, are not properly the subject of federal regulation.

Allowing the Act to extend to hydrologically isolated wetlands would also intrude upon the states' primary power to regulate land and water use, which, and this Court has noted that the Act cannot be interpreted to permit such an intrusion. *SWANCC*, 531 U.S. at 172. Indeed, this case precisely demonstrates how a conflict between federal and state regulation can emerge. Before the Corps ever considered exercising its authority over the Property, the Michigan Department of Environmental Quality (MDEQ) had granted Petitioners' state-law application to develop

the Property. In making its decision, the MDEQ evaluated a variety of ecological factors, particularly whether and to what extent the filling of the wetland on the Property might affect the Lake St. Clair watershed. After this consideration, it was the judgment of state government that Petitioners' use of the Property would not adversely affect any of the state's interests. Given that the Property has no demonstrable connection to any interstate water or to anything else that would substantially affect a federal interest, it is inconsistent with the fundamental principles underlying the Commerce Clause for the federal government to regulate the Property, or any other wetland that lacks a hydrological connection to the waters of the United States.

CONCLUSION

In *SWANCC*, this Court held that the Corps could not regulate an isolated intrastate water under the Clean Water Act. In this case, Petitioners own a wetland that is isolated in precisely the same way as the man-made ponds at issue in *SWANCC*. Just as it was unlawful for the Corps to regulate such ponds, so should it be unlawful for the Corps to regulate Petitioners' wetland. According to their established case law, the overwhelming majority of federal courts would prohibit the regulation of a hydrologically isolated intrastate wetland, but the Sixth Circuit has departed from all of this authority and has ruled that the Corps may regulate Petitioners' property, even though there was never any finding at any stage of this case of whether or how the development of Petitioners' property would substantially affect any federal interest. This Court should take jurisdiction of this

case to resolve the conflict created by the Sixth Circuit's decision here and to generally clarify the law regarding the scope of federal authority to regulate wetlands under the Act.

For these reasons, this Court should grant Petitioners' petition for a writ of certiorari.

Respectfully Submitted,

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

(Any footnotes trail end of each document)

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

June Carabell; Keith Carabell; Harvey Gordenker; Frances Gordenker,
Plaintiffs-Appellants,

v.

United States Army Corps of Engineers; United States Environmental Protection Agency,
Defendants-Appellees.

August 11, 2004, Argued
Decided and Filed: September 27, 2004, Filed*

COUNSEL: ARGUED: Paul R. Bernard, DICKINSON, WRIGHT, PLLC, Detroit, Michigan, for Appellants.

Todd S. Kim, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Paul R. Bernard, Timothy A. Stoepker, DICKINSON, WRIGHT, PLLC, Detroit, Michigan, for Appellants.

Todd S. Kim, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

M. Reed Hopper, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Amicus Curiae.

JUDGES: Before: BATCHELDER and GIBBONS, Circuit Judges; STAFFORD, District Judge**.

OPINION BY: STAFFORD

OPINION: STAFFORD, District Judge. Plaintiffs appeal the summary judgment for the defendants in this action to review final agency action under the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1387. We affirm.

I.

Plaintiffs, June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker (collectively, "Carabells"), own 19.61 acres of property in Chesterfield Township, Macomb County, Michigan. In prehistoric times, this property was submerged under Lake St. Clair. As the lake receded over time, some areas of the Carabells' property remained covered by wetlands. Today, the property--located approximately one mile northwest of Lake St. Clair--encompasses 15.96 acres of wooded wetlands, constituting one of the last remaining large forested wetland parcels in Macomb County.

The Carabells want to construct a large multi-family condominium development on their property. The property is shaped like an inverted right triangle, the hypotenuse of which runs from the southwestern corner of the parcel at a 45 degree angle to the northeast corner. Following the hypotenuse and

separating the Carabells' property from the adjacent property is an unnamed ditch. When the ditch was excavated, the spoils were cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch. The berm edging the Carabells' property serves to block immediate drainage of surface water out of the parcel into the ditch. Wooded conditions exist up to the upland rim of the ditch. At the northeastern corner of the property, the ditch connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system. Although the record does not establish the direction of water flow in the ditch, the ditch empties either into the Sutherland-Oemig Drain at the northeastern corner of the property, or into ditches at the southwestern corner of the property that--like the Sutherland-Oemig Drain--outlet into Auvase Creek and eventually into Lake St. Clair.

In 1993, the Carabells applied to the Michigan Department of Environmental Quality ("MDEQ") for a permit to fill 15.9 acres of the forested area of their property for construction of a 130-unit condominium complex. The MDEQ initially denied their application after the United States Environmental Protection Agency ("EPA") and the United States Fish and Wildlife Service filed comments opposing the application. The denial was based on findings that "the proposed activity would have a significant adverse impact on the natural resources, public interest and public trust held in the subject wetlands." J.A. at 667. On appeal, a state administrative law judge ("ALJ") ordered the MDEQ to issue the Carabells a state permit for a 112-unit alternative condominium

development with on-site wetland enhancement. Consistent with the ALJ's order, a permit was issued in November of 1998 over the EPA's objections. The permit specifically stated that "authority granted by this permit does not waive any jurisdiction of the U.S. Army Corps of Engineers or the need for a federal permit." J.A. at 49.

Soon after the permit was issued, the EPA notified the MDEQ that the state-issued permit did not constitute authority under the CWA for the permitted activities. The EPA asserted its federal jurisdiction over the Carrabells' project under the CWA, and it advised the MDEQ that the United States Army Corps of Engineers ("Corps") had the authority under the CWA to process a federal permit application by the Carrabells. Although the Carrabells contested federal jurisdiction over their project, they nonetheless applied to the Corps for a permit to place 57,437 cubic yards of fill on the wetland. The application indicated that they would disrupt 15.87 acres of wetland but would dredge and replant 3.74 acres of wetland.

On September 11, 2000, after three site inspections, the Corps issued its permit evaluation, stating that the operation and use of the proposed activity would have major, long term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area. The Corps also stated that issuance of the permit would have minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and on aquatic wildlife. By letter dated October 5, 2000, the Corps notified the Carabells that their application

for a permit had been denied. In its letter, the Corps stated:

> Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest. J.A. at 519. The Corps further explained that the denial was also based on the Carabells' failure to overcome the presumption that there were less damaging practicable alternatives available.

The Carabells filed an administrative appeal of the Corps' decision denying their permit application. The Carabells argued (1) that the Corps lacked regulatory jurisdiction over the property because the wetlands were purportedly isolated from all outside waters by a spoil berm; (2) that the MDEQ's permit issuance decision barred the Corps from denying the Carabells a permit; and (3) that the Corps should have issued the Carabells a permit because their proposed activities met all statutory and regulatory requirements. After a site visit by the appeal review officer and an appeal

conference, the Carabells were notified that all of their grounds for appeal lacked merit and that their appeal had been denied.

On July 26, 2001, the Carabells filed this action in federal district court. The case was referred to a magistrate judge, who held a hearing on the parties' cross-motions for summary judgment. The magistrate judge recommended that the Carabells' motion for summary judgment be denied and that the defendants' motion for summary judgment be granted. Among other things, the magistrate judge concluded that "because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." J.A. at 849. The magistrate judge also found that the denial of the Carabells' permit application was rational based on the Corps' conclusions regarding the likely effects of the Carabells' proposed project and on the Carabells' failure to demonstrate the absence of less damaging practicable alternatives. After the Carabells filed objections to the magistrate judge's report and recommendation, the district court entered an order and judgment accepting the magistrate judge's recommendations and entering the report and recommendations as the court's own findings and conclusions. This timely appeal ensued.

II.

We review the district court's summary judgment order de novo. Sierra Club v. Slater, 120 F.3d 623, 632 (6th Cir. 1997). Where, as here, the district court's order is based on its review of an administrative

agency's final decision, our review is governed by the Administrative Procedure Act ("APA"). Id. The APA provides that a court shall set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is highly deferential, and the court is "not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). An agency's factual findings are conclusive if supported by substantial evidence, and an agency's interpretation of its own regulations is entitled to substantial deference and will be upheld unless plainly erroneous or inconsistent with the regulatory text. 5 U.S.C. § 706 (2)(E); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945); United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir.2003).

III.

On appeal, the Carabells maintain that the district court erred when it (1) held that the Corps had CWA jurisdiction over the Carabells' property; and (2) affirmed the Corps' decision to deny the Carabells' permit application.

A.

The CWA requires landowners to obtain permits from the Corps before they discharge fill material into "navigable waters." 33 U.S.C. § 1344(a). Congress has defined "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. §

1362(7). The EPA and the Corps have defined "waters of the United States" to include:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce...

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.33 C.F.R. § 328.3(a) (Corps) (emphasis added); see also 40 C.F.R. § 122.2 (EPA). The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). "Adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." Id.

In this case, the district court determined that the Carabells' property contains wetlands adjacent to neighboring tributaries of navigable waters of the United States. Specifically, the magistrate judge, whose report was accepted by the district court, found that:

Plaintiffs' property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that the ditch connects to the Sutherland-Oemig Drain. The Drain, which neighbors a corner of the property, connects to Lake St. Clair.J.A. at 847. Having concluded that the Carabells' property is not isolated from waters of the United States but instead constitutes "adjacent wetlands" within the meaning of the CWA, the district court decided that jurisdiction under the CWA existed. We agree with that decision.

The record here establishes that the unnamed ditch running along the hypotenuse of the Carabells' triangle-shaped property is separated from wetlands only by a man-made berm or barrier. At its northeastern end, the ditch is connected to the Sutherland-Oemig Drain, a drain that empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. At its southwestern end, the ditch is connected to other ditches, which--like the Sutherland-Oemig Drain--outlet into the Auvase Creek and eventually into Lake St. Clair. The ditch, then, is connected on either end to tributaries of "waters of the United States" as defined in the regulations. Whether water in the ditch flows northeasterly or southwesterly, the ditch is necessarily a tributary of "waters identified in paragraphs (a)(1)-(6) of...section [328.3(a)]." Because the wetlands on the Carabells'

property are separated from a tributary of "waters of the United States" only by a man-made berm or barrier, they are considered "adjacent wetlands" under § 328.3(a)(7). As such, the wetlands at issue in this case fall within the jurisdiction of the Corps for purposes of the CWA.

The Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001) ("SWANCC"), does not persuade us otherwise. Before SWANCC, the Corps had defined its jurisdiction under the CWA as extending to intrastate waters that provide habitat for migratory birds. In rejecting the Corps' "Migratory Bird Rule," the SWANCC Court made clear that isolated intrastate waters cannot be subject to the Corps' jurisdiction under the CWA. Id. at 166.

A minority of courts have read SWANCC broadly to limit the Corps' jurisdiction under the CWA to navigable waters and non-navigable waters that directly abut navigable waters. See, e.g., In re Needham, 354 F.3d 340, 345-46 (5th Cir. 2003). Conversely, a majority of courts, including this court, have narrowly interpreted SWANCC as holding only that the CWA does not reach isolated waters--in SWANCC, an abandoned, isolated gravel pit--having no connection with navigable waters. See, e.g., United States v. Rapanos, 339 F.3d 447, 452-53 (6th Cir. 2003) (adopting a limited reading of SWANCC and concluding that the CWA reached a roadside ditch and its adjacent wetlands), cert. denied, 158 L. Ed. 2d 467, 124 S. Ct. 1875 (2004); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (same).

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), the Supreme Court upheld the Corps' "adjacent wetlands" jurisdiction. Noting that Congress chose to define the waters covered by the CWA broadly, the Court wrote:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment--or where its importance is outweighed by other values--the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Id. at 135 n.9. In SWANCC, moreover, the Court did not alter the Riverside-Bayview holding. Indeed, while noting Congress's "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters," SWANCC, 531 U.S. at 167, the SWANCC Court did not decide any issue with regard to "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7). The SWANCC Court instead addressed the application of the Corps' Migratory Bird Rule to isolated ponds defined as

"waters of the United States" under § 328.3(a)(3). 531 U.S. at 174.

Since SWANCC, this court has noted:

> In Riverside Bayview the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [Solid Waste] described as "the significant nexus between the wetlands and 'navigable waters.' "There is also a nexus between a navigable waterway and its nonnavigable tributaries....This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act.

Rapanos, 339 F.3d at 452 (quoting Deaton, 332 F.3d at 712); see also United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004) (explaining that CWA jurisdiction over "adjacent wetlands" requires a significant nexus between the wetlands and navigable waters, "which can be satisfied by the presence of a hydrological connection"). Consistent with both Rapanos cases, the district court in this case determined that there is a "significant nexus" between the wetlands on the Carabells' property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States. We find no error in the district court's decision.

B.

The Carabells contend that, even if CWA jurisdiction exists over their property, the district court nonetheless erred by failing to overrule the Corps' decision on the merits of their permit application. Based on its review of the relevant regulations and the Corps' evaluation of the Carabells' permit application, the district court concluded that the Corps provided a rational basis for its decision. Because we agree that the Corps' decision was neither arbitrary nor capricious, we find no basis for disturbing the district court's determination.

IV.

For the foregoing reasons, we AFFIRM the district court's decision granting summary judgment to the defendants.

Footnotes

* This decision was originally issued as an "unpublished decision" filed on September 27, 2004. On November 15, 2004, the court designated the opinion as one recommended for full-text publication.

** The Honorable William Stafford, United States District Judge for the Northern District of Florida, sitting by designation.

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

June Carabell; Keith Carabell; Harvey Gordenker; Frances Gordenker,
Plaintiffs-Appellants,

v.

United States Army Corps of Engineers; United States Environmental Protection Agency,
Defendants-Appellees.

Filed: September 27, 2004, Filed

Before: BATCHELDER and GIBBONS, Circuit Judges; STAFFORD, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to the defendants is AFFIRMED.

ENTERED BY THE COURT

Leonard Green, Clerk

CASE NO. 01-72797

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JUNE CARABELL, and individual, KEITH CARABELL, an individual, HARVEY GORDENKER, an individual, and FRANCES GORDENKER, an individual,
Plaintiffs,

- vs -

THE UNITED STATES ARMY CORPS OF ENGINEERS and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants.

March 27, 2003, Decided
March 27, 2003, Filed

ORDER (1) ACCEPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, (2) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND (3) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COUNSEL: For JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, FRANCES GORDENKER, plaintiffs: Timothy A. Stoepker, Peter H. Webster, Paul R. Bernard, Jennifer P. Fitzgibbons, Dickinson Wright, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Geneva S. Halliday, Eastern District of Michigan, U.S. Attorney's Office, Detroit, MI. Laurel A. Bedig, U.S. Department of Justice, Environmental Defense Section, Washington, DC.

JUDGES: PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: PAUL D. BORMAN

OPINION:

The Court has reviewed the magistrate judge's Report and Recommendation, filed on February 28, 2003. The Court has also reviewed the Plaintiffs' Objections to the Report and Recommendation, which was filed on March 14, 2003.

IT IS ORDERED that the Report and Recommendation (Docket # 22) is accepted and entered as the findings and conclusions of this Court, that Plaintiffs' motion for summary judgment is DENIED, and that Defendants' motion for summary judgment

is GRANTED.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: MAR 27 2003
Detroit, Michigan

JUDGMENT

On this date, the Court accepted the Report and Recommendation of Magistrate Judge Wallace Capel.

Therefore a judgment shall be entered in favor of the Defendants, The United States Army Corps of Engineers and the United States Environmental Protection Agency and against the Plaintiffs, June Carabell, Keith Carabell, Harvey Gordenker, and Francis Gordenker.

DATED: 3/27/03

No. 03-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNE CARABELL, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Defendants-Appellees.

Filed: January 10, 2005

ORDER

BEFORE: BATCHELDER and GIBBONS, Circuit Court Judges; and STAFFORD*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE COURT

Leonard Green, Clerk

Footnotes

* Hon. William H. Stafford, Senior, United States District Judge for the Northern District of Florida, sitting by designation.

Case No.: 01-CV-72797-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JUNE CARABELL, et. al.,
Plaintiffs,

vs.

THE UNITED STATES ARMY CORPS OF ENGINEERS and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants.

February 28, 2003, Decided
February 28, 2003, Filed

REPORT AND RECOMMENDATION

COUNSEL: For JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, FRANCES GORDENKER, plaintiffs: Timothy A. Stoepker, Peter H. Webster, Paul R. Bernard, Jennifer P. Fitzgibbons, Dickinson Wright, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Geneva S. Halliday, Eastern District of Michigan, Detroit, MI.

For UNITED STATES ARMY CORPS OF ENGINEERS, ENVIRONMENTAL PROTECTION AGENCY, defendants: Laurel A. Bedig, U.S. Department of Justice, Washington, DC.

JUDGES: WALLACE CAPEL, JR., UNITED STATES MAGISTRATE JUDGE. HON. PAUL D. BORMAN.

OPINION BY: WALLACE CAPEL , JR.

OPINION:

I. INTRODUCTION

This matter is before the Court on the parties' cross-Motions for Summary Judgment filed on April 12, 2002, and May 31, 2002. Both Motions concern the denial of a 404 Permit by the Army Corps of Engineers ("COE"), to fill wetland on Plaintiffs' property. At issue is whether the COE has jurisdiction over Plaintiffs' property, and if so, whether the decision to deny the Permit was arbitrary and capricious.

II. PLAINTIFFS' STATEMENT OF FACTS

A. The Carabell Property

Keith and June Carabell own a 19.6-acre parcel of land located in Chesterfield Township, Macomb County, Michigan. The property is shaped roughly like an inverted right angle, with one leg running along a north-south line, and the other leg running along an east-west line. (See Site Location Maps, attached to Carabell's Application for Permit to Army Corps and MDEQ, DNR File No. 93-14-0602). The hypotenuse of the triangle runs along a northeast-southwest line, and a ditch for a county drain, the Sutherland-Oemig Drain, follows the hypotenuse for 1,800 feet. (Id). The ditch is no wider than four feet, and the water in it is no deeper than six inches.

An upland ridge runs along the west side of the drain; it was apparently formed by the sidecasting of spoils during the excavation of the ditch. (MDEQ Proposal for Decision, 8/12/99, at 11). This clay ridge prevents water from the forested area of the property from draining into the ditch. Another small amount of upland, less than four acres, is located in the southwest corner of the parcel. (See Site Location Maps, supra). The property is forested predominantly with swamp oak and cottonwood trees, and includes no man-made structures. (Leighton Testimony, 10/27/97 at 357).

The property retains an undetermined amount of water for an undetermined period, and it has not been established in the record whether the property retains this water on an annual basis or less frequently. (See Administrative Appeal Decision, 3/5/2001 at 3). The record evidence is uncontroverted on one point: the property does not retain water at all times. (MDEQ Proposal for Decision, 8/12/99 at 11). Moreover, it is also undisputed that the property does not have a surface water connection to any adjacent property or any adjacent body of water. (Id). In short, the water that is periodically present in the forested portion of the property does not drain to the Sutherland-Oemig drain or to any body of water; it remains on the property until it is absorbed by the soil and vegetation.

The property abuts Donner Road, which runs along its north-south side, and it is near Interstate 94, which passes to its northwest. (See Site Location Maps, supra). A large subdivision of single-family homes is between the property and the freeway. (Id). To the north of the property is 23 Mile Road, and, between that road and the property are a vacant field and

several condominium and apartment complexes. (Id). To the southeast of the property, on the other side of the Sutherland-Oemig Drain, is another subdivision of residential homes, and this subdivision borders Lake St. Clair. (Id). To the east of the property is a vacant woodlot, several more residential subdivisions and then a large woodlot, which is slated for development into a residential subdivision. (Id).

B. Proceedings Before the MDEQ and Issuance of a Permit to Plaintiffs.

In 1993, the Carabells applied to the MDEQ for a permit to fill 15.9 acres of the forested area of the property for the purpose of building 130 condominium units, along with the associated roads and utilities. In March 1994, the EPA filed written objections to the Carabell's application. The MDEQ then denied the application.

The Carabell's then filed an alternative plan, seeking to fill only 12.2 acres and build 112 condominium units. (MDEQ Application, supra). The alternative plan also proposed to construct retention ponds on 3.74 acres of the property; these ponds would filter any water draining across the property as a result of the development. n1 (See MDEQ Proposed Decision, 8/12/99).

The MDEQ then conducted a contested case hearing before an administrative law judge. The Carabells and the MDEQ submitted extensive testimonial and documentary evidence to the ALJ, who issued a proposed decision in August 1998 that recommended the issuance of the permit. Crucial to the ALJ's ruling

was the fact that the property was isolated from any body of water:

This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents a discharge of water both to and from the site, and the Sutherland-Oemig drain is bermed, which prevents the discharge of water either into it or from the drain.

(Id. at 11)(emphasis added).

A final Determination and Order embodying the proposed decision was issued on September 30, 1998. (MDEQ Final Determination and Order, 9/30/99). This order mandated that the Carabells be granted a permit allowing them to develop the property according to their alternative plan.

C. Intervention by the EPA and Corps.

In November 1998, acting pursuant to 33 U.S.C. § 1344, the EPA notified the MDEQ that it objected to the issuance of the permit to Plaintiffs, and it asserted federal jurisdiction over the case on the ground that the property was a wetland that was adjacent to the navigable waters of the United States. Also pursuant to § 1344, the EPA authorized the Corps to determine whether a federal permit should issue to allow the proposed development. Although the Carabells contested federal jurisdiction, they nevertheless submitted a permit application to the Corps.

The Corps initially conducted a Permit Evaluation, which was based upon three site inspections. (Department of Army Permit Evaluation, 9/11/2000). In the Permit Evaluation, the Corps found that the property must be part of the Lake St. Clair watershed because other property in a roughly similar location was a part of the watershed. In the words of the Permit Evaluation: "due to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that the same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well." (Id. at 6)(emphasis added). The Permit Evaluation also noted that the drainage ditch along the hypotenuse of the property drained into the Sutherland-Oemig Drain, but, in making this finding, the Corps did not cite any particular observation or other evidence. (Id). The finding seems to be based upon its assessment of the probability that the property was part of the Lake St. Clair watershed.

Indeed, the speculative character of the Corps's entire fact-finding is confirmed by its description of the relationship of the property to the tributary system of Lake St. Clair. According to the Corps, the "ditch ... along the southeast portion of the property" runs into the Sutherland-Oemig Drain, which runs into Auvase Creek, which runs into Lake St. Clair. (Id). This is simply a factual error. The "ditch ... along the southeast portion of the property" is the Sutherland-Oemig Drain. This error demonstrates the haphazardness of the Corps's own factual inquiry.

The Corps denied that application on October 5, 2000. (Letter from Lt. Col. Richard J. Polo, 10/5/2000 ("Decision Letter")). In this Decision Letter to the Carabells, the Corps's District Engineer, Lt. Col. Richard J. Polo, Jr., noted that the property was a valuable seasonal habitat for aquatic organisms and a year-round habitat for terrestrial organisms and that the property "provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair." (Id. at 1) In an accompanying Memorandum for the Record, Lt. Colo. Polo found that projects like the one proposed by the Carabells were "resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." (Memorandum for the Record at 1). This impact on the water quality of the Lake St. Clair watershed was a crucial factor in Lt. Col. Polo's assessment of the public interests associated with the project. (Id. at 2).

In light of these characteristics of the property and in light of the Corps's assessment of the relative public and private interests, the decision letter concluded that it was necessary for the Carabells to identify feasible alternatives, such as the use of different parcels of upland property for the development or the changed use of the property to make the maximum possible use of the upland along Donner Road. (Decision Letter at 2). Whether or not such alternatives were feasible, Lt. Col. Polo concluded that the Carabells would have to mitigate any development of the property by providing "the complete functional replacement of the forested wetlands" on the property. (Decision Letter at 2).

On December 1, 2000, the Carabells submitted a request for an appeal to the Corps. (Request for Appeal). They argued that the Corps did not have jurisdiction over the property, that the MDEQ's decision to grant a permit precluded any action by any federal agency, and that the Corps erred in the merits of its decision. A Corps hearing officer conducted a brief visit to the property on January 30, 2001, and, later that day, conducted a hearing on the Carabells' appeal.

At the hearing, the Corps asserted that its jurisdiction was derived from § 1344 and 33 C.F.R. § 328.3(a) because the property was a wetland that was adjacent to the waters of the United States. (Transcript of 1/30/2001 at 18-19). The Corps disclaimed jurisdiction under any other statue, including the migratory bird act. (Id.). In discussing the factual basis for federal jurisdiction, the Corps evaded an inquiry into whether the property was part of the Lake St. Clair watershed:

MR. STOEPKER: The question I have is can you cite to me where it says natural tributary system in the rules or statutes? I'm aware it says navigable. We were there today and there is nothing navigable here. A sailboat could not move up and navigate this. Does the drain flow north or south based upon the changes? Does it, in fact, flow into Lake St. Clair?

MS. CHUBB: [the Corps' Administrative Appeal Officer]: I think that is a separate question that will probably be answered in the appeal decision.

MR. STOEPKER: I guess my question to you, Mr. Guathier, where does it say tributary?

MS. CHUBB: Tributary to the navigable water, is that what you're asking?

MR. STOEPKER: Right.

MS. CHUBB: That is really a question for the division. It is not a question for the district. It may end up that way, but initially this is a division process.

(Id. At 20-21). Following in their pattern of avoidance, both the administrative hearing officer and the Army Corps evaded questions regarding the substantial effect of the Sutherland-Oemig Drain of the Carabell wetlands on interstate commerce, as neither would answer the questions posed by the Carabell's counsel:

MR. STOEPKER: Okay. I'm looking at a section of the regulations where it talks about interstate wetlands. All other water such as interstate lakes, rivers, streams, including intermittent streams, wetlands mud flats, sand flats, then which could effect interstate or foreign commerce, including such waters which are or could be used by interstate or foreign travelers for interstate or other purposes from which fishing or shellfish could or would be taken from interstate commerce.

Does anybody find any shellfish with in the Oemig Drain? Are any fish at all in the interstate commerce, is that the position you're taking? The next qualification - I mean is that answer yes or no? I need to know.

MS. CHUBB: This is not an inquisition here. It is more of your presentation. Their record stands alone as it currently is. Whatever is in here is their position. That is the best they can do at this time.

(Id. at 21). These passages demonstrate that the Corps had no meaningful evidence to establish the directional flow of the Sutherland-Oemig Drain, its navigability, or its effect on interstate commerce.

The Corps denied the Carabells' appeal on March 5, 2001. In the Administrative Appeal Decision, the Corps continued to avoid making a conclusive finding regarding the connection between the property and the Lake St. Clair watershed. The Decision acknowledged that there was evidence directly contradicting the Permit Evaluation's findings regarding the flow of the Sutherland-Oemig Drain. Indeed, the Decision acknowledged that the Corps itself had not made a conclusive finding:

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesternly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue.

(Administrative Appeal Decision at 3). Moreover, the Decision rejected the idea that facts about the influence of Lake St. Clair on the Salt River could have any bearing on the question whether the property was part of the Lake St. Clair watershed:

This District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries

(Auvase Creek and the Sutherland-Oemig Drain) to 23-Mile Road as it does on the Salt River, an established federally navigable water. The administrative record does not support this statement.

(Id).(emphasis added). Notwithstanding all of this uncertainty, the Decision concluded that the property was part of the watershed and was within federal jurisdiction because "the appellant has not presented any information to refute the District's evaluation." (Id. at 2-3).

The Decision also cursorily rejected the Carabells' arguments regarding the preclusion of federal agency action and the merits of the Corps' decision. In particular, the Decision's ruling regarding the merits of the permit application was derivative of its jurisdictional ruling. Because the property was identified as part of the Lake St. Clair watershed, the Decision regarded Lt. Col. Polo's evaluation of the merits of the application as correct. n2

III. DEFENDANT'S STATEMENT OF FACTS

A. Description of the Property

The property at issue contains one of the last remaining large forested wetlands in the whole of Macomb County. AR Vol. 1, Doc. 55. at 13; Doc. 75. The Corps determined in the permitting process that building in these wetlands would have a major, long term detrimental impact on water quality, terrestrial biota, wetlands, conversation and overall ecology, and would permanently destroy the forested wetlands on the

property. AR Vol. 1, Doc. 55, at 10, 14, 15, 16 and 21. See also Docs. 75, 76 and 89.

The property is located approximately one mile from the shoreline of Lake St. Clair and consists of approximately 19.6 acres, of which 15.96 acres were delineated as wetland by the Carabells in their permit application. See AR Vol. 1, Doc. 2 and Doc. 55, at 6. The Corps' inspection of the property confirmed that the property contains mostly forested wetlands. AR Vol. 1, Doc. 55, at 6; Doc. 70, at 1-2. These wetlands are the prehistoric remnant of Lake St. Clair. AR Vol. 1, Doc. 55, at 5. The property is triangular shaped and a ditch has been excavated along the southeast portion of the property (the hypotenuse of the triangle). AR Vol. 1, Doc. 55, at 6. This unnamed ditch runs into the Sutherland-Oemig Drain ("Drain") at the northeastern corner of the property. n3 The Drain empties into Auvase Creek which flows into Lake St. Clair. Id.; AR Vol. 1, Doc. 71. These drainage patterns were derived by the Corps based in part on the Corps' analysis of the United States Geological Survey's topographical quadrangle for New Haven, Michigan, which showed elevation contour lines descending down the Drain past the subject property to the point where the Drain and Harms Drain combine to form Auvase Creek, which is a connecting water with Lake St. Clair. See USGS Quadrangle Map for New Haven, Michigan cited at AR Vol. 1, Doc. 55, at 27.

The property contains a berm that runs along both sides of the ditch. The man-made berm was created from sidecast spoil as a result of the construction of the ditch. Id. at 7. The ditch appears to have been dug in wetland. AR Vol. 1, Doc. 89, at 2-3.

B. The Corps' Determination of Regulatory Jurisdiction

The Corps' Statement of Findings concerning the Carabell application based regulatory jurisdiction over the subject wetlands on the fact that the wetlands are "adjacent to a drain which empties directly into [Lake St Clair], a Section 10 water." n4 AR Vol. 1, Doc. 75, at 1. The District Project Manager documented the adjacency of the wetlands to the Drain during his site inspection on May 5, 2000. AR Vol. 1, Doc. 71.

Moreover, in the course of the appeal of the permit denial to the Corps' Great Lakes and Ohio River Division ("Division"), the Division found that the Carabell wetlands are also adjacent to the unnamed ditch. AR Vol. 1, Doc. 89, at 2-3. Thus, the wetlands are adjacent to both the Drain and the unnamed ditch. n5

C. The Carabells' Application to the Corps for a Permit

On August 23, 1999, the Corps received a permit application from the Carabells. n6 AR Vol. 1, Doc. 2. The Carabells proposed to discharge approximately 57,500 cubic yards of material within a 15.97 acre wetland area for construction of a 112-unit townhouse condominium development. AR Vol. 1, Doc 55, atl. As mitigation, the Carabells proposed to dredge and replant 3.74 acres of the remaining wetlands on the parcel. Id.

The Corps conducted three site inspections on the property. The first inspection occurred on October 12, 1999, for permit evaluation purposes; the second on May 5, 2000, for migratory bird use documentation; and the third on August 1, 2000, to determine if the area

contained Indiana Bat habitat. Id. at 6; AR Vol. 1, Docs. 70, 71, 72. The report summarizing the findings of the May 5, 2000 inspection included a determination of adjacency to the Sutherland-Oemig Drain and stated that the Drain flowed continuously into Auvase Creek which flows into Lake St. Clair. AR Vol. 1, Doc. 71; see also AR Vol. 1, Doc. 76, at 6.

On February 8, 2000, the Corps issued a Joint Public Notice for the proposed development. AR Vol. 1, Doc. 56. EPA, USFWS, the Macomb County Prosecutor's Office and the Lake St. Clair Advisory Committee all strongly objected to the proposed development. AR Vol. 1, Docs. 16, 17, 19, and 11, respectively. The USFWS specifically noted that wetlands of the type at issue here "are becoming increasingly scarce" (AR Vol. 1, Doc. 17) as did the Macomb County Prosecutor's Office ("this parcel is one of the last remaining sizeable areas of forested wetland in Chesterfield Township.") AR Vol. 1, Doc. 19.

The Corps prepared a 27-page Permit Evaluation dated September 11, 2000, which consisted of the Corps' Environmental Assessment, Public Interest review summary, and factual and compliance determinations according to the 404(b)(1) guidelines. AR Vol. 1, Doc. 55. On October 5, 2000, the Corps sent the Carabells a letter denying the permit and enclosing the Corps' Statement of Findings as well as a copy of the September 11, 2000 Permit Evaluation. AR Vol. 1, Doc. 76. The denial letter stated in part:

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year around habitat for terrestrial

organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

AR Vol. 1, Doc. 76, at 1.

In addition to its determination that the proposed project was contrary to the public interest, the Corps' decision to deny the permit was also based upon the presumption in the 404(b)(1) guidelines that there are less damaging practicable alternatives available. Id. at 1-2. The Carabells did not overcome that presumption and, therefore, the project did not comply with the guidelines. Id.

D. The Carabells' Administrative Appeal of the Permit Denial

In a letter dated December 1, 2000, the Carabells appealed the Corps' denial of their permit application to the Division. The Carabells alleged that: (1) the Corps did not have regulatory jurisdiction over the wetlands; (2) the Corps was barred by res judicata (based on the prior holding in the State administrative appeal of the

permit denial by MDEQ and MDEQ's subsequent issuance of a permit) from denying the permit; and (3) the Carabells had demonstrated that the permit was issuable under the applicable laws and regulations. AR Vol. 1, Doc. 80.

On the jurisdictional issue, the Carabells argued that the wetlands are isolated and, therefore, based on the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), the Corps lacks regulatory jurisdiction. n7 AR Vol. 1, Doc. 89, at 2.

As part of the appeal process, the Division conducted an additional site inspection on January 30, 2001, which was documented by the Detroit District project manager. AR Vol. 1, Doc. 86. The participants in the site visit discussed the direction of the flow of the unnamed ditch. Mr. Leighton, the Carabells' consultant, believed that the ditch flowed southwest (away from the Sutherland-Oemig Drain). Mr. Deroche, the District project manager, stated that, in a previous site inspection, he had observed the ditch flowing northeast towards the Drain. AR Vol. 1, Docs. 87, 89.

On January 30, 2001, after the site visit, an appeal conference with the parties was held. The conference was transcribed (see AR Vol. 2, Doc. 9) and summarized in writing by the Appeal Review Officer. AR Vol. 2, Doc. 10.

On March 5, 2001, the Division issued its decision and found that the three issues for appeal presented by the Carabells lacked merit. AR Vol. 1, Doc. 89, at 5. First,

the Division found that SWANCC was not relevant because the wetlands were not isolated. Id. at 3. Rather, the Division found that the wetlands are adjacent "to a surface tributary system of a navigable waterway, Lake St. Clair." Id. at 1. In particular, the Division found that:

> The project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St. Clair. The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils ... The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berms on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above.
>
> Id. at 2-3.

The Division further found that the Carabells had not presented any information to refute this finding. Id. at 3.

Second, the Division also determined that res judicata was not a legal principle applicable to the appeal and did not bar the Corps from deciding against the Carabells. Id. at 4.

Finally, the Division determined that the District completed a fair and reasonable review of the Carabells' application in accordance with all applicable laws and regulations. Id. at 2. Specifically, the Division

found that the Carabells had not met their burden under the 404(b)(1) guidelines because they had not demonstrated that their proposal was the least environmentally damaging practicable alternative, and had not adequately demonstrated avoidance and minimization of aquatic impacts. Id. at 4, 5.

This appeal followed.

IV. STANDARD OF REVIEW

Judicial review of the decision of the COE is governed by the Administrative Procedure Act ("APA"). The APA provides that a court shall set aside agency "findings, conclusions, and actions" that are "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The party asserting the challenge to the agency's actions bears the burden of demonstrating that these actions were arbitrary, capricious, or otherwise not in accordance with the law. See Sierra Club v. Marita, 46 F.3d 606, 616 (7th Cir. 1995). The standard of review is highly deferential and the final agency action is "entitled to a presumption of regularity." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971). The scope of judicial review "is narrow and the court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). The reviewing court must carefully "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." Citizens to Preserve Overton Park, 401 U.S. at 416. The reviewing

courts duty is to hold the agency to "certain minimal standards of rationality" and is not to inject its opinion in place of that of the agency who, because of its expertise has been entrusted with the decision making power. Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1, 36 (D.C. Cir.) cert. denied, 426 U.S. 941, 96 S. Ct. 2662, 49 L. Ed. 2d 394, 96 S. Ct. 2663 (1976).

The court is not to serve as a "rubber stamp" to the agency's decision. Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n., 59 F.3d 284, 290 (1st Cir. 1995). The "agency must have examined the relevant data and have articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Motor Vehicles Mfrs. Ass'n of the United States, Inc., 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S. Ct. 239, 245-246, 9 L. Ed. 2d 207 (1962)). The agency may not rely on post-hoc rationalizations or justifications in support of its decisions. Id. Nor "ignore evidence placed before it by interested parties." Consumer Union of the U.S., Inc. v. Consumer Product Safety Commission, 491 F.2d 810, 812 (2nd Cir. 1974). If the agency's determination cannot be sustained based upon the record, then it must be remanded for further consideration. Camp v. Pitts, 411 U.S. 138, 143, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973).

It is within this narrow scope of review that the motions for summary judgment must be decided. Under Fed.R.Civ.P. 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue

as to any material fact that the moving party is entitled to judgment as a matter of law." In essence, Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. Bender v. Southland Corp., 749 F.2d 1205, 1210-1211 (6th Cir. 1984). However, the Court is not permitted to judge the evidence or make findings of fact. Ivy Street Corporation v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. This burden may be discharged by showing there is an absence of evidence to support the nonmoving party's case. Celotex Corp., 477 U.S. at 325. Once the moving party discharges this burden, it then shifts to the nonmoving party to present specific facts showing a genuine triable issue. Fed.R.Civ.P, 56(e). To create a genuine issue of material fact, the nonmoving party must produce evidence sufficient to require submission of the issue to a jury. Lucas v. Leaseway Multi Transp. Serv. Inc., 738 F. Supp. 214, 217 (E.D. Mich 1990).

V. DISCUSSION

Plaintiff contends that the COE has no jurisdiction over the property because it is an isolated wetland that is

unconnected to any navigable waters of the United States or to any tributary or watershed of such waters.

Plaintiff argues that the COE must establish that the Sutherland-Oemig Drain is navigable or that the Drain is a tributary of the waters of the United States to establish jurisdiction. Plaintiff claims that the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("SWANCC") reaffirmed that the scope of the Clean Water Act ("CWA") and its attendant regulations is limited to the waters and wetlands that have some tangible connection to the navigable waters of the United States. Plaintiff asserts that the CWA only applies to bodies of water of the United States by surface water connections, ground water connections, or both.

The Defendants argue that both the unnamed Ditch and the Sutherland-Oemig Drain are tributaries under 33 C.F.R. § 328.3(a)(5), and contend that SWANCC is not applicable because Plaintiff's property is not isolated, and contends that SWANCC does not hold that a direct hydrological connection is required to establish jurisdiction based on adjacency. Section 404(a) of the CWA, 86 Stat.884, as amended, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." The statute defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2002).

The COE's definition of waters of the United States is found 33 C.F.R. § 328.3:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Prior to SWANCC, a majority of courts held that the jurisdiction of the CWA extended to wetlands which were adjacent to non-navigable tributaries which flowed into navigable waters. See United States v. Pozsgai, 999 F.2d 719 (3rd Cir. 1993); Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) cert. denied, 474 U.S. 1055, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986); United States v. TGR Corp., 171 F.3d 762 (2nd Cir. 1999); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

In January of 2001, the Supreme Court issued its decision in SWANCC. SWANCC involved a consortium of twenty-three suburban Chicago cities and villages that purchased an abandoned mining site to use for disposal of baled nonhazardous solid waste. Because the site required the filling of permanent and seasonal ponds which existed on the property, a request was made of the COE to determine whether a landfill permit was required under § 404(a) of the CWA, 33 U.S.C. § 1344(a). The COE determined that the site qualified as 'waters of the United States' and asserted jurisdiction under the Migratory Bird Rule, 51 Fed.Reg. 41217 (1986), and denied SWANCC a § 404(a) permit. SWANCC sued the COE arguing that the COE had exceeded their statutory authority in interpreting the CWA to cover non-navigable, isolated, intrastate waters based upon the presence of migratory birds.

The Supreme Court held that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to Plaintiff's balefill site

pursuant to the 'Migratory Bird Rule,' 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.

In reaching its decision, the Court evaluated the meaning of § 404(a) and stated:

This is not the first time we have been called upon to evaluate the meaning of S 404(a). In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), we held that the Corps had S 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Id., at 133, 106 S. Ct. 455. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See id., at 135-139, 106 S. Ct. 455. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetland "inseparably bound up with the 'waters' of the United States." Id., at 134, 106 S. Ct. 455.

It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in Riverside Bayview Homes. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water ...." Id., at 131-132, *168.

In declining to extend its ruling in Riverside Bayview Homes, the Court stated:

We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under S 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significant." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in Riverside Bayview Homes that the word "navigable" in the statute was of "limited import." 474 U.S., at 133, 106 S. Ct. 455, and went on to hold that S 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-408, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

The ruling in SWANCC created a split among courts as to how the ruling should be interpreted. Some courts have interpreted SWANCC to limit jurisdiction under the CWA. Courts adopting this interpretation take the

position that a "body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." See Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001); United States v. Rapanos, 190 F. Supp.2d 1011 (E.D. Mich 2002; United States v. RGM Corporation, 222 F. Supp.2d 780 (E.D. Virginia 2002); United States v. Newdunn Associates, 195 F. Supp.2d 751 (E.D. Virginia 2002).

Other courts maintain that SWANCC has not altered the jurisdiction of the CWA. They view the Court's ruling in SWANCC to be very narrow, and interpret SWANCC as applying only to isolated waters which have no hydrological connection to navigable waters. See Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001); United States v. Interstate General Co., 152 F. Supp.2d 843 (D. Md. 2001); United States v. Buday, 138 F. Supp.2d 1282 (D. Mont. 2001); United States v. Lamplight Equestrian Center, Inc., 2002 U.S. Dist. LEXIS 3694, 2002 WL 360652 (N.D. Ill. 2002).

Plaintiff urges the Court to adopt the interpretation of the Fifth Circuit and other courts which find that no jurisdiction exists under the CWA unless the body of water is actually navigable or adjacent to an open body of navigable water. I decline to do so because I am not convinced that Plaintiff's interpretation of SWANCC is correct. I am more persuaded by the reasoning of the courts which have concluded that the Court's ruling in SWANCC was narrow, and did not substantially narrow the jurisdiction of the COE under the CWA.

In Lamplight Equestrian Center, Inc., Id., the Court summarized the rulings of a number of courts that declined to read SWANCC as a broad reduction of the COE's authority to regulate waters under the CWA. The Court determined that the critical issue which ran through this case was whether a nexus existed between the property and the relevant interstate water. The Court stated:

"This court finds the reasoning of the cases following Headwaters persuasive, and agrees with those courts that SWANCC did not effect so substantial a change in the Corps' jurisdiction. Much of the SWANCC opinion has no direct relevance here because that case involved isolated waters lacking a physical/hydrological connection to other navigable waters. The SWANCC decision acknowledged that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Act] in Riverside Bayview Homes." SWANCC, 531 U.S. at 167. Thus, in this court's view, the critical issue is whether there is a "significant nexus" between the Property's wetlands and the Fox River."

Plaintiffs' property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that the ditch connects to the Sutherland-Oemig Drain. (Tr. 55-61). The Drain, which neighbors a corner of the property, connects to Lake St. Clair. (Tr. 54).

The COE claims jurisdiction over the property because the Corps' definition of "waters of the United States" includes "wetland adjacent" to other categories of

waters of the United States, including tributaries. 33 C.F.R. § 328.3(a)(7).

Plaintiff claims that both the ditch and the Drain are not tributaries because they are not navigable. Plaintiff also argues that there is insufficient evidence that the waters from the ditch flow into the drain, and therefore, the ditch cannot be a tributary. Plaintiffs' argument is not supported by the case law, including SWANCC.

In United States v. Ashland Oil and Transportation, 504 F.2d 1317 (6th Cir. 1974), the court held that Congress had constitutional authority under its interstate commerce powers to prohibit discharge of pollutants into non-navigable tributaries of navigable streams.

In Headwaters, Inc., Id., the court quoted from the Eleventh Circuit's decision in United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997) in holding that ineqation canals were "waters of the United States," and thus subject to the CWA. In Eidson, the court stated:

"Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage. It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in a traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a "water of the United States" under the Act."

Eidson, 108 F.3d at 1342.

The court in Headwater, Inc., Id., listed other decisions reaching the same conclusions; Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999)(small volume stream running only intermittently is "navigable water"); Quivira Mining Co. v. United States Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (creeks and arroyos connected to streams during intense rainfall are "waters of the United States"); United States v. Interstate Gen. Co., 152 F. Supp.2d 843, 847 (D Md. 2001)(describing SWANCC as a narrow holding "limited to the Migratory Bird Rule and not affecting regulations defining "non-navigable tributaries and streams" as waters of the United States.").

Even the decision in SWANCC lends no support to Plaintiff's argument. In his dissenting opinion, Justice Stevens stated:

"In its decision today, the Court draws a new jurisdictional line; one that invalidates the 1986 Migratory Bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." SWANCC, 531 U.S. at 176.

He went on to state that:

"Even if the majority were correct, that Congress did not extend the Corps' jurisdiction in the 1972 CWA to reach beyond navigable waters and their non-navigable tributaries. Congress' rejection of the House's efforts in 1977 to cut back on the Corps' 1975 assertion of

jurisdiction, clearly indicates congressional acquiescence in that assertion. Id., at 184."

Justice Stevens also stated:

"But the Court ignores the provisions legislative history, which makes clear that Congress understood § 404(g)(1) - and therefore, federal jurisdiction - to extend, not only to navigable waters and non-navigable tributaries, but also to "isolated" waters, such as those at issue in this case. Id., at 187.

It is clear from Justice Stevens dissent that the court was not negating the Corps' jurisdiction over non-navigable tributaries of navigable waters.

In Riverside Bayview Homes, Inc., 474 U.S. at 134, the court stated:

"In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source on the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that the definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction, is a permissible interpretation of the Act."

I conclude, therefore, that because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to "waters of the United States," it is in fact not isolated, and is subject to the jurisdiction of the CWA. Plaintiffs' argument

concerning the Commerce Clause, which is dependant on the property being isolated, therefore is not applicable.

Plaintiffs' final argument is that the COE erred in rejecting the application on the merits. Plaintiff argues that in denying the permit, the Corps emphasized that the property was an important part of the Lake St. Clair watershed and fulfilled important functions in drainage, filtering and flood control. Plaintiff maintains that the property does not fulfill any of those functions.

Plaintiff also argues that the mitigation proposed by the Plaintiffs as part of their application would actually promote the drainage and filtering functions more effectively than maintenance of the property in its current form.

Plaintiff also takes issue with the Corps' determination that Plaintiff confine the construction of the condominiums to the upland portion of the property, or establish why they cannot purchase an alternative parcel of land elsewhere in Macomb County. Plaintiff claims that the administrative record demonstrates that there is no appropriately zoned property available in Macomb County, and suggests that it is unfeasible to build a 112-unit condominium on less than four acres of upland on the property.

The COE made the following relevant findings in its permit evaluation of Plaintiff's property:

Shoreline Erosion and Accretion Effects:

The project would eliminate the potential ability of the wetland to act as a sediment catch basin. Increased

runoff due to the filling of the wetlands and creation of impervious surfaces, i.e., condominiums, driveways, roads, etc., could increase erosion and/or sedimentation in the S-O Drain, Auvase Creek, and Lake St. Clair. The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex would empty into these significantly smaller areas, quickly overtopping them. These wetlands would then empty into the drain and most functions served by the existing forested wetlands would not be replaced. The project would contribute to increased runoff and would likely result in increased erosion and accretion along the drain and further downstream in Auvase Creek.

In summary, the project will have minor, long term, negative impacts on erosion/accretion. The cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in Chesterfield Township to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease impacts to downstream erosion/accretion; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a

significant reduction in the area of fill to reduce those impacts to a minor level.

Effects on Flood Hazards and Floodplain Values:

The proposed project would aid in the prevention of flooding for the applicant and authorization of such a project would encourage the applicant to invest in a parcel that shows evidence of flooding/standing water conditions. Because there is limited acreage remaining in the Chesterfield Township area which provides for storm water storage and delayed release of these waters, it is likely that the downstream areas will see an increase in possible flooding magnitude and frequency. This is due to the fact that there will be a net increase in runoff since the parcel is not currently a part of the S-O Drain watershed. Construction of the project and similar projects could have detriments to downstream residents.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex is proposed to empty into these significantly smaller areas, which will quickly exceed their storage capacity. These wetlands would then empty into the drain and the functions of water storage (from precipitation) served by the existing forested wetlands to would not be replaced (See drawing Pages 4-8 of Enclosure 1).

In summary, the project will have minor, short term and long term, negative impacts on flood hazards and

floodplain values. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be avoided if the permit were denied.

The applicant did not adequately address avoidance of wetlands, the first necessary sequence in the Section 404(b)(1) guidelines. As their alternative analysis, the applicant submitted contested case hearing transcripts indicating there is only one other parcel in Chesterfield Township zoned for multi-family development. They did not explain why they could not pursue use of this parcel. They also failed to address the availability of other upland parcels, the possibility of seeking and being granted zoning variances within the Township, the use of several smaller parcels instead of one large parcel, or change in design to fit the available zoning. This presumption must be overcome before moving to the second hurdle in the Guidelines. n8

Section 404 of the CWA, authorizes the COE to issue a permit to allow discharge of dredged or fill materials into those waters governed by the Act. The Section 404 permit process is governed concurrently by COE guidelines, 33 C.F.R., Parts 320-329, and by EPA guidelines, 40 C.F.R. Part 230. Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986).

Section 320.4 of 33 C.F.R. sets forth the general policies that guide the COE in its evaluation of the permit applications for fill activities. The regulations require the COE to conduct a public interest review, balancing the "benefits which reasonably may be expected to accrue from the proposal against the reasonably foreseeable detriments," with consideration for the

"national concern for both protection and utilization of important resources." Id., § 320.4(a)(1). A permit is to be granted unless it is determined that issuance would be contrary to the public interest. Id.

A Section 404 Permit must comply with relevant EPA regulations. Id. EPA regulations provide that "no discharge of dredged or fill material shall be permitted if there is a practical alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

Under 40 C.F.R. § 230.10(a)(3), where the activity associated with a discharge which is proposed for a special aquatic site, does not require access or proximity to or sitting with the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependant"), practical alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the purposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise.

Plaintiffs' proposed condominium project is not water dependant, therefore, a practical alternative is presumed to be available. The administrative record establishes that Plaintiff never sought out, or investigated that site. Although Plaintiffs' witnesses' testified as to no other property available other than

that parcel, not one witness testified that an investigation was undertaken to determine if the available parcel was a suitable alternative. The COE provided a rational basis for its decision regarding the possibility of a practical alternative, and I cannot conclude that the decision was arbitrary or capricious.

I also conclude that the COE provided a rational basis for their decisions concerning shoreline erosion and accretion effects, flood hazards, and floodplain values. The Court is reminded that it is not to substitute its own judgment for that of the agency; as long as the agency provides a rational explanation for its decision. Citizens to Preserve Overton Park, Inc., 401 U.S. at 416.

III. CONCLUSION

For the reasons stated above, it is respectfully recommended that Plaintiffs' Motion for Summary Judgment be DENIED, and the Defendants' Motion for Summary Judgment be GRANTED.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation that they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the Court, in its discretion, may enlarge the period of time in which to file objections to the report.

WALLACE CAPEL, JR.

UNITED STATES MAGISTRATE JUDGE

Date: 2-28-03

Footnotes

n1 To the extent that the development of the property allowed water from adjacent areas to drain across the property, the retention ponds would filter this water as well. (MDEQ Proposed Decision at 10).

n2 Plaintiff's Statement of Facts is taken verbatim from their Motion for Summary Judgment, pages 2-9.

n3 The Plaintiffs in their brief seem to have confused the unnamed ditch with the Sutherland-Oemig Drain. See, e.g., Carabell Brief at 2-3; 5-6. There are, in fact, two bodies of water, and the wetlands are adjacent to both. The unnamed ditch runs along the hypotenuse of the triangular-shaped property and is part of the property. It connects to the Sutherland-Oemig Drain, which passes by the northeast corner of the property on its way to Auvase Creek.

n4 The Corps also administers Section 10 of the 1899 Rivers and Harbors Act for structures or work in or affecting "navigable waters of the United States." These are waters that are, have been, or are susceptible for use to transport interstate or foreign commerce. 33

C.F.R. § 329.4. The Corps is required to keep a listing of such waters (33 C.F.R. § 329.16) and Lake St. Clair appears on this list.

n5 The District has also based jurisdiction on the Commerce Clause because of the presence of migratory birds on the property. Due to the decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), this basis of jurisdiction is no longer applicable.

n6 In 1987, the Carabells originally applied to the Michigan Department of Environmental Quality, ("MDEQ") for a permit to discharge fill material on the property for construction of a 200 unit condominium complex. However, the history and findings of the state proceedings are immaterial to this action, which is entirely based upon the administrative record established after EPA sustained their objections to the issuance of a State permit and Section 404 permit authority was transferred from the State to the Corps pursuant to CWA Section 404(j) and 40 C.F.R. § 233.50(j). AR Vol. 1, Doc. 89, at 1.

n7 SWANCC was decided on January 9, 2001, subsequent to the October 5, 2000 permit denial.

n8 Taken verbatim from the Permit Evaluation, Administrative Record, Volume 2, Document 17, pgs. 10, 11, 23, and 24.

ADMINISTRATIVE APPEAL DECISION

KEITH & JUNE CARABELL,
FILE NO. 99-250-002-1

DETROIT DISTRICT

MARCH 5, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226 -3425.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): December 4, 2000

Appeal Conference Date: January 30, 2001

Site Visit Date: Same

Background Information: The appellant proposes to construct a 112-unit townhouse condominium development on a 19.6-acre triangular-shaped parcel-located in Chesterfield Township, Macomb County, Michigan: A county drain follows the. hypotenuse side of the property on a northeast-southwest alignment. A small amount of upland is located in the southwest corner of the parcel and along the ditch." The appellant

proposes to place fill into approximately 15.9 acres of wetland and convert approximately 3.7 acres of forested wetland to emergent and open-water cover types as mitigation (enhancement).

Following Michigan Department of Natural Resources (MDNR) permit reviews in 1993 and 1994 with subsequent permit denials; a Michigan Department of Environmental-Quality (MDEQ) administrative law judge ruled in favor of a modified project design in September 1998 and ordered the issuance of a State permit. The United States Environmental Protection Agency (USEPA) sustained their objections to issuance of a. permit and, pursuant to Section 404(j) of the Clean Water Act and 40 CFR 233.50(j), Section 404 permit authority was transferred from the MDEQ to the Army Corps of Engineers (Corps).

The appellant subsequently filed an application dated 19 August 1999 with the Detroit District (District). The District published a public notice (PN) on 8 February 2000 and conducted three site visits on 12 October 1999, 5 May 2000 and 2 August 2000. Following the review period, the application was denied on 5 October 2000. The appellant submitted a RFA to the Division on 4 December 2000.

Summary of Decision: I find that this RFA has no merit. The onsite wetland is regulated because it is adjacent to a tributary system of Lake St. Clair. Further, under the Clean Water Act (CWA), the permit issuance decision by the MDEQ administrative law judge does not bar Federal review and jurisdiction. The District completed a fair and reasonable review of

the appellant's application in accordance with all applicable laws and regulations.

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):

Reason l.: The Corps has no jurisdiction over the land at issue.

Finding: Reason I of this appeal has no merit.

Action: No action required.

Discussion: The appellant considers the onsite wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County (SWANCC) v U.S. Arm Corns of Engineers. The appellant also does not consider the onsite ditch to be waters of the United States. The appellant requested that the Corps identify the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable waters and for tributaries to navigable waters.

Under the Federal Water Pollution Control Act (FWPCA) amendments of 1972 (Public Law 92-500), Congress extended Corps' regulatory jurisdiction beyond the traditional "navigable waters" to include "all waters of the United States", including wetlands (33 U.S.C. 1362). In 1977, the FWPCA was further amended and renamed the Clean Water Act. Title 33 U.S.C. 1344 (also known as Section 404) requires a

permit from the Secretary of the Amy for discharges of dredged or fill material into "all waters of the United States." The statutory authorities under which the Corps implements.its regulatory program are found at 33 CFR 320.2 and the policies, practices, and procedures followed by the Corps in connection with the review of permit applications to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 are found at 33 CFR 323.

"Waters of the U.S." include traditional navigable waters and their tributaries, adjacent wetlands and isolated waters with an interstate commerce nexus. "Adjacent" means bordering, contiguous or neighboring and includes wetlands separated from other waters of the U.S. by a man-made dike or barrier, natural river berms, beach dunes and the like (33 CFR 328). "Isolated waters" are defined as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies (33 CFR 330.2). A ditch excavated in a water of the U.S. (wetland or stream) remains a regulated water of the U.S. provided an Ordinary High Water mark is present. A ditch constructed wholly within upland is generally not a water of the U.S. (Preamble to 2000 Nationwide Permit Regulations, 65 FR 12823).

In this case, the District determined that the onsite wetland was adjacent to a surface tributary system of a navigable waterway, Lake St. Clair. Specifically, the project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St Clair.

The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils (Toledo silty clay loam, 0-2% slopes) by the U.S. Department of Agriculture, Natural Resources Conservation Service (Macomb. County Soil Survey, 1971). The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berets on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above. Construction of the ditch is thought to have occurred some fifty to sixty years ago, prior to CWA jurisdiction.

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesterly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM also remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the southwest property corner is 584.50 feet U.S. Geological Service (USGS) datum and 584.40 feet at the northeast corner. The lowest elevation is 583-90 feet, noted at two locations along the ditch northeast of its midpoint along the property line.

Although confusing, the appellant has not presented any information to refute the District's evaluation. Furthermore, even if I assume that the ditch flows in a

southwesterly direction, the USGS topographical map, New Haven quadrangle, appears to indicate. that the ditch is connected to other ditches that outlet to Auvase Creek and eventually Lake St. Clair. This decision does not prevent the appellant from presenting new information to the District for reconsideration of their original determination.

The District also performed a site visit in May 2000 [Environmental Assessment (EA) enclosure 16] to document migratory bird use and their connection to interstate commerce: The recent U.S. Supreme Court ruling (SWANNC v. Corps) negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters. The SWANNC decision is not relevant to this proposal because the subject wetlands are not isolated.

Finally, although not raised in the RFA, during the appeal conference the appellant questioned a statement made by the District in the decision document. The District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries (Auvase Creek and the Sutherland-Oemig Drain) to 23-Mile Road as it does on the Salt River, an established federally navigable waterway (EA paged). The administrative record does not support this statement. The Ordinary High Water elevation for Lake St. Clair is 576.3 feet International Great Lakes Datum (IGLD), 1985, and the bottom elevation of the onsite ditch at the northeastern end is 583.7 feet IGLD, 85 (converted from 584.4 feet USGS Datum) This statement may be supported by bottom elevations for the nearby Sutherland-Oemig Drain but they are absent from the administrative record. However, the District's

statement is irrelevant to the jurisdictional determination made by the District and to the discussion above.

Reason 2: The issues presented in the Carabell's RFA were already decided by the MDNR in favor of the Carabells, so the Corps and the USEPA are barred by res judicata from deciding against the Carabells.

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: The appellant believes that the State of Michigan, while administering the Section 404 program, was acting on behalf of the federal government. The USEPA, pursuant to Section 404(g) and 40 CFR 233, formally transferred administration of the Section 404 permit program to the State of Michigan through a Memorandum of Agreement (MOA) signed in 1983. However, under Section 404(j), the State must still coordinate with the USEPA on certain classes and categories of activities. Because theappellant's proposed discharge of fill material exceeded 10,000 cubic yards, the subject application was not waived from the requirements of Section 404(j). The USEPA responded to the State's public notice with a letter of objection dated 4 March 1994. Regulations at 40 CFR 233.50(j) clearly state that if the State neither satisfies EPA's objections nor denies the permit, processing of the Section 404 permit application reverts to the Secretary of the Army, acting through the Chief of Engineers.

Following issuance of a State permit, pursuant to an administrative court order, the USEPA sent a letter dated 23 November 1998 that sustained their objections to the project. This effectively transferred Section 404 permitting authority to the Corps pursuant to the aforementioned regulations.

Res judicata is not an applicable legal principal here. There has been no preceding decision or judgment regarding this permit Application in a federal forum. The State of . Michigan followed its own program procedures by conducting an administrative hearing.

The USEPA objected to the result. When the USEPA objects to the State's issuance of a permit, and the State does not revise the permit (or deny it) in accordance with the stated objections, both Section 404(j) of the CWA and 40 CFR 233.50(j) require the. Administrator of the EPA to turn over the permit application to the Secretary of the Army so that the Secretary can process the permit application. The MOA between the State and the USEPA merely implements the statute and regulation.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Finding: Reason 3 of this appeal has no merit.

Action: No action required.

Discussion: In the RFA, the appellant states that the primary factors in the District's denial decision are valuable seasonal habitat and water storage functions

from the public interest review. While the District's 5 October 2000 letter does mention these factors, the letter also states that the denial is based on non-compliance with the USEPA's 404(b)(1) Guidelines. The presence of potential habitat and use of the site by the Indiana bat (Myotis sodalis) and possible consultation with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act is also unresolved. Therefore, the appellant has not shown compliance with all applicable laws and regulations.

The District conducted a fair and adequate public interest review. They published a PN, considered all comments received and documented their evaluation of the applicable public interest review factors. Besides the effects on wildlife habitat and water quality, the District also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. The District did err when they stated that the proposed storm water detention basin would outlet into the proposed mitigation areas. The proposed project drawings show that the detention basin would outlet to the county ditch. This error is present under several EA headings including Operational Impacts on Water Quality, Shoreline Erosion and Accretion, Flood Hazards and Floodplain Values, and Effects on Wetlands, and is implied in Effects on Aquatic Biota. However, although this misconception was a factor in the District's evaluation of the aforementioned public interest factors, this error is harmless because it, alone, is not the sole or overwhelming basis of the District's denial decision.

The District acted appropriately in finding that the appellant has not demonstrated that the proposal is the least environmentally damaging practicable alternative. A housing project is a non-water dependent activity and does not require siting in a wetland.

During the State administrative hearing, Mr. Patrick Meagher, the planning consultant for Chesterfield township, stated that, besides the project site, another undeveloped property is zoned RM-3 (multifamily development) within Chesterfield township (Transcript page 166). At the appeal conference, the appellant stated that this parcel was not considered in their alternatives analysis because it would mean "abandoning" the project parcel. The appellant only examined oh-site alternatives and those did not result in a measurable decrease in wetland impacts. Additional properties may also be available if re-zoned for RM-3 development. A permit cannot be issued when a less environmentally damaging practicable alternative exists or when insufficient information is provided to determine compliance [40 CPR 230.12(a)(3)].

Although the appellant has not demonstrated avoidance and minimization of aquatic impacts, the District also determined that the proposed mitigation was inadequate. They found that the conversion of 3.7 acres of onsite forested wetland to emergent and open water cover types would not replace the wetland functions lost due to the proposed fill activities. Thd District did not consider alternative mitigation proposals that may be acceptable because earlier steps in the Guidelines sequence (avoidance and minimization) had not been

adequately addressed. The appellant bears the burden of proof to demonstrate compliance with the Guidelines.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request For Appeal do not have merit.

ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding

CELRE-ET-RG 99-250-002-1 (1145b) October 5, 2000

MEMORANDUM FOR Record

SUBJECT: Statement of Findings on Proposed Discharge in wetlands at Chesterfield Township, Michigan by Keith and June Carabell

1. Reference attached Environmental Assessment (EA) on the proposed work.

2. Summary/Remarks:

The agent for the applicant went on record, on two separate occasions as stating that the project is not within a state, or federally-regulated wetland (See EA Enclosures 12 (Pg. 2, Para. 2.a.) and 13 (Pg. 1, 2nd Para.)). The record clearly establishes the site as being used for interstate commerce (neo-tropical migratory bird stopping point) and as adjacent to a drain which empties directly into a Section 10 water (See Encl. 16).

The applicant offered an exchange of 3.74 acres of forested wetlands with the same acreage of emergent wetland as mitigation for the 15.87 acres proposed to be eliminated through the discharge of fill material. compensation is the final step in the sequence of avoidance, minimization and compensation. Since the presumption of avoidance has not been addressed and satisfied, the offer of compensation is premature.

The project will destroy one of the last remaining forested wetlands in Chesterfield Township, and one of the last remaining large forested tracts of land in not only the Township, but also in Macomb County. Areas

such as this forested wetland provide invaluable habitat for resident and neo-tropical migrant birds, as well as to the dwindling populations of small and large mammals in the area. Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed. Public recreation will suffer through a reduction in populations of birds and mammals, many of which are fed and/or photographed by people in this highly developed area. Although one of the applicant's expert witnesses in the contested case hearing states that a recent study reveals a need for 150 senior units within Chesterfield Township, at no time during the processing of this permit application did the applicant, or his agent, indicate the purpose of the work was to construct senior housing. Regardless, we presume that there is a less damaging alternative.

3. Conclusions and Determinations:

a. Compliance with the Section 404(b) (1) Guidelines of the Clean Water Act: The proposed discharge fails to comply with the Guidelines.

4. Public Interest Determinations.

I determined that the project would have minor, long-term benefits to the economy of the area, as well as the applicant, and to property ownership. I determined that the project would have major, long-term detriments to water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology. MDEQ has issued their respective permit, and this reflects positively on the factor of land use.

Weighing the minor benefit's that may be reasonably expected to accrue from this project against its reasonably foreseeable detriments, I determined that the detriments greatly outweigh the benefits to the overall public interest. Although MDEQ issued a state permit, land use benefits are outweighed by the total detriments to other national public interest factors. The cumulative impacts of this, and other similar projects, would impact wildlife habitat, and increase flood hazards, as well as negatively impact the water quality of the receiving water. These become issues of overriding national importance and require a more stringent evaluation of alternatives and of minimization of impacts. The detriments of the project are therefore significant issues of overriding importance since they outweigh the benefits.

I have determined that the U.S. Department of the Interior, Fish and Wildlife Service (FWS) request that a survey to determine the presence of Indiana bat (Myotis sodalis) or its potential habitat is unwarranted at this time. Consultation must be completed when, as a result of a federal action (in this case, issuance of a Section 404 permit), the Corps of Engineers makes an EFFECT determination. In this case, denial is overwhelming, as issuance of the requested permit would not be in the public interest. Therefore, resolution of this issue is unnecessary. Should the applicant provide compelling reason why a permit should be issued, or submit a plan which significantly reduces impacts to the aquatic environment to a minimal level, the District will conduct consultation with the FWS.

5. Decision:

Review of this application has included all policies of paragraph 320.4, "General Policies for Evaluating Permit Applications." I have concluded that the determination as to denial of the requested permit is within my authority as set forth in 33 CFR Part 325.8. The proposal is contrary to the public interest and denial of the permit is appropriate, even though this decision is contrary to a state decision.

a. The requested permit is denied.

b. The applicant be notified of the decision.

RICHARD J. POLO JR.
LTC EN
Commanding

DEPARTMENT OF THE ARMY
DETROIT DISTRICT CORPS OF ENGINEER
BOX 1027
DETROIT, MICHIGAN 48231-1027

October 5, 2000

IN RELPY REFER TO

Engineering & Technical Services
Regulatory Office
File No. 99-250-002-1

Keith and June Carabell
c/o Tim Stoepker
Abbott, Nicholson, Quilter, Esshaki
and Youngblood
300 River Place, Suite 3000
Detroit, Michigan 48207

Dear Mr. and Mrs. Carabell:

I have reached a decision on your application for a Department of the Army permit to discharge fill material for construction of a condominium development in wetlands at Chesterfield Township, Michigan. After due consideration of the record and the appropriate regulations, I have determined that the project is contrary to the overall public interest, and have decided to deny your request for a permit.

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water

storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oernig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

This decision was also based on an evaluation of the project's compliance with the 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The Guidelines were developed by the U.S. Environmental Protection Agency pursuant to the 1977 Clean Water Act, and they establish criteria for evaluating proposed projects. The Corps of Engineers is obligated to deny applications for discharges when work does not comply with the Guidelines. One critical threshold of the Guidelines is a thorough consideration of less damaging practicable alternatives. For projects such as yours, the Guidelines require that we presume that less damaging alternatives are available unless clearly demonstrated otherwise. You have not overcome this presumption, and therefore your project does not comply.

One apparent less damaging alternative would be to purchase an upland, or primarily upland, parcel of property elsewhere in the Chesterfield Township area that maybe zoned or re-zoned for multi-family

residential development. There may be other less damaging alternatives, as well. If there prove to be none, we would give favorable consideration to a project that significantly reduces impacts to the forested wetland on your property, such as construction along Donner Road that utilizes the upland to the maximum extent possible. We would also require the mitigation to provide for the complete functional replacement of the forested wetlands proposed for development.

You are hereby notified that you and/or your authorized agent(s) may appeal a denied individual permit under the Corps of Engineers Administrative Appeals Process. Should you wish to appeal this decision, you must fill in and submit the enclosed Request for Appeal (RFA) within 60 days of the date of this letter. Your RFA must be submitted to the division engineer at:

Brigadier General Robert H. Griffin
U.S. Army Corps of Engineers
Lakes & Ohio River Division
P.O. Box 1159
Cincinnati, Ohio 45201-1159

Should you have any questions, please contact Bob Deroche at the above address or telephone (313) 226-6813. Please refer to File Number: 99-250-002-1.

Sincerely,

Richard J. Polo Jr.
Lieutenant Colonel, U.S. Army
District Engineer

Enclosures

Copy Furnished:

MDEQ, Livonia (93-14-602)

Supreme Court
JUN 15 2005
OFFICE OF THE CLERK

(5)

No. 04-1384

In the Supreme Court of the United States

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KELLY A. JOHNSON
Acting Assistant Attorney General
GREER S. GOLDMAN
TODD S. KIM
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the United States Army Corps of Engineers acted reasonably in interpreting the term "waters of the United States" as it appears in the Clean Water Act (CWA), 33 U.S.C. 1362(7), to encompass a wetland area that is separated from a tributary of a traditional navigable water by a narrow man-made berm, where evidence in the record reflected the presence of at least an occasional hydrologic connection between the wetland and the adjacent tributary.

2. Whether the application of the CWA to the wetland at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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In the Supreme Court of the United States

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v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 391 F.3d 704. The opinion of the district court (Pet. App. 15a-17a) and the report and recommendation of the magistrate judge (Pet. App. 20a-57a) are reported at 257 F. Supp. 2d 917.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sought permission to fill a wetland in Macomb County, Michigan, in order to build a condominium complex. The United States Army Corps of Engineers (Corps) denied petitioners' permit application under the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, and petitioners filed suit to challenge that determination. The district court granted summary judgment to the Corps and the Environmental Protection Agency (EPA). Pet. App. 15a-17a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *see International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not naviga-

ble in the traditional sense.").[1] In *Riverside Bayview*, the Court upheld the Corps' assertion of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362; 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

specified disposal sites." 33 U.S.C. 1344(a). Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the EPA (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). As it relates to this case, the definition encompasses traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5); 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7); 40 C.F.R. 230.3(s)(7). The regulations define the term "adjacent" to "mean[] bordering, contiguous, or neighboring," and they provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c); 40 C.F.R. 230.3(b).

3. Petitioners own a tract of 19.61 acres in Chesterfield Township in Macomb County, Michigan. Pet. App. 2a. One of the last large forested wetlands in Macomb County covers 15.96 acres of the property. *Ibid.* That wetland is a remnant of prehistoric Lake St. Clair, which now lies about a mile to the southeast. *Ibid.*; C.A. App. 106-107.

The property is in the shape of a right triangle. Pet. App. 2a. An unnamed ditch runs along the hypotenuse, from the southwest to the northeast corner of the property. *Id.* at 2a-3a. When the ditch was excavated from the wetland, the excavated material created a small berm running along both sides of the ditch. *Id.* at 3a. Portions of the berm obstruct surface water flow to the ditch, but the berm may be overtopped when water levels are high. *Ibid.*; C.A. App. 108, 639. The berm also contains drainage cuts that facilitate water flow from the wetland into the ditch. *Id.* at 639.

The ditch connects with the Sutherland-Oemig Drain at the northeastern corner of the property. Pet. App. 3a. The Sutherland-Oemig Drain flows into Auvase Creek, which flows into Lake St. Clair. *Ibid.* Lake St. Clair, which connects Lake Huron and Lake Erie and lies between Michigan and Canada, is a traditional navigable water. *Ibid.* At the southwestern corner of the property, the ditch connects with other ditches that in turn drain into Auvase Creek and, eventually, into Lake St. Clair. *Ibid.*

4. In 1993, petitioners applied to the Michigan Department of Environmental Quality (MDEQ), which administers an EPA-approved CWA program (40 C.F.R. 233.70; see 33 U.S.C. 1344(g)-(h)), for a permit to fill the wetland to facilitate construction of a 130-unit condominium complex. Pet. App. 3a. Both EPA and the United States Fish and Wildlife Service (FWS) filed comments opposing the application. *Ibid.* MDEQ initially denied the application, but a state administrative law judge directed it to issue a permit allowing a 112-unit complex. *Id.* at 3a-4a. Under the CWA and implementing regulations, however, EPA's continuing objection required petitioners to seek the Corps' approval as

well. *Id.* at 4a; see 33 U.S.C. 1344(j); 40 C.F.R. 233.50(j).

In August 1999, petitioners applied to the Corps for a permit to fill the wetland. Pet. App. 4a; C.A. App. 32-40. The application indicated that petitioners would fill 15.87 acres of wetland while dredging and replanting 3.74 acres. Pet. App. 4a. Various parties objected to the permit application, including EPA, FWS, the Lake St. Clair Advisory Committee, and the Water Quality Unit of the Macomb County Prosecutor's Office. C.A. App. 79-90.

In September 2000, after three site inspections, the Corps issued its permit evaluation. Pet. App. 4a. The Corps concluded that petitioners' proposed development activities would have substantial negative impacts on water quality, terrestrial wildlife, and the overall ecology, plus lesser effects regarding downstream erosion and sedimentation, flood hazards and floodplain values, and aquatic wildlife. *Ibid.*

In October 2000, the Corps officially notified petitioners that it had denied their permit application. Pet. App. 4a-5a. The Corps found that petitioners' proposed filling activities were subject to the CWA because, *inter alia*, the relevant wetland is "adjacent to a drain which empties directly into a [covered] water." *Id.* at 69a.[2]

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[2] The Corps' initial denial of petitioners' permit application was issued before this Court's decision in *SWANCC*. In finding that petitioners' proposed discharge was subject to the CWA, the Corps relied in part on record evidence "establish[ing] the site as being used for interstate commerce (neo-tropical migratory bird stopping point)." Pet. App. 69a. In its subsequent decision denying petitioners' administrative appeal, the Corps recognized that this Court's intervening decision in *SWANCC* "negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters." *Id.* at 63a. The Corps concluded, however, that "[t]he

Given the anticipated negative effects of the proposed discharges on "water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology," the Corps concluded that "the detriments greatly outweigh the benefits to the overall public interest." *Id.* at 70a-71a; see *id.* at 5a.

In December 2000, petitioners filed an administrative appeal, arguing, *inter alia*, that the Corps lacks regulatory jurisdiction over the wetland. Pet. App. 5a. In March 2001, the Corps denied the administrative appeal. *Id.* at 58a-68a. The Corps found that petitioners' proposed filling activities were subject to the CWA because the wetland on their property is "adjacent to a surface tributary system of a navigable waterway, Lake St. Clair." *Id.* at 61a; see *id.* at 60a-64a. The Corps explained that "the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency [under 33 C.F.R. 328.3(c)]." *Id.* at 62a.

5. In July 2001, petitioners filed suit in the United States District Court for the Eastern District of Michigan, challenging the Corps' denial of their permit application. Pet. App. 6a; C.A. App. 6. Petitioners alleged, *inter alia*, that the Corps and EPA lacked regulatory jurisdiction over their proposed filling activities because the wetland on their property was not part of the "waters of the United States" within the meaning of the CWA. *Id.* at 15-16. The case was referred to a magistrate judge, and the parties submitted cross-motions for summary judgment. Pet. App. 6a.

The magistrate judge issued a report and recommendation that the district court grant summary judgment

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SWANCC decision is not relevant to [petitioners'] proposal because the subject wetlands are not isolated." *Ibid.*

to the Corps and EPA. Pet. App. 20a-57a. The magistrate judge concluded that, "because [petitioners'] property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." *Id.* at 49a. The district court adopted the magistrate judge's report and recommendation and entered judgment in favor of the Corps and EPA. *Id.* at 15a-17a.

6. The court of appeals affirmed. Pet. App. 1a-13a. The court held that, under the CWA and implementing regulations, the Corps has regulatory jurisdiction over petitioners' proposed discharges because the wetland on their parcel is adjacent to tributaries of a traditional navigable water. *Id.* at 9a-10a. In particular, the court recognized that a wetland separated only by a berm or other man-made barrier from a tributary remains "adjacent" to that tributary under 33 C.F.R. 328.3(a)(7). Pet. App. 9a-10a. The court of appeals also concluded that this Court's decision in *SWANCC* did not cast doubt on the validity of the Corps and EPA regulations governing "adjacent wetlands," which this Court had upheld in *Riverside Bayview*. *Id.* at 10a-12a. The court of appeals upheld the district court's determination that "there is a 'significant nexus' between the wetland on the [petitioners'] property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States." *Id.* at 12a.

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 4, 6, 8-23) that the assertion of federal regulatory authority in this case was impermissible under the Clean Water Act and conflicts with decisions of this Court and other courts of appeals because the wetland at issue here lacks any hydrologic connection with a traditional navigable water. That contention rests on a mistaken understanding of the factual record, and it does not merit review.

Petitioners repeatedly assert (Pet. 4, 6, 8, 19, 21) that the wetland at issue in this case is not hydrologically connected to other waters. The record does not support that characterization of the relevant wetland. Rather, the wetland on petitioners' tract has at least an occasional hydrologic connection to the unnamed ditch and thus to Lake St. Clair, a traditional navigable water.

The Corps, whose factual findings are entitled to substantial deference, see 5 U.S.C. 706(2)(E), concluded that the small berm lying between the wetland and the adjacent ditch "serves to block *immediate* drainage out of the parcel and hold[s] water *until it is quite high*." C.A. App. 108 (emphasis added). The court of appeals likewise stated that the berm "serves to block *immediate* drainage of surface water out of the parcel into the ditch." Pet. App. 3a (emphasis added). Neither the Corps nor the courts below described the berm as blocking *all* water movement from the wetland to the ditch. Petitioners' expert and attorney conceded in the administrative record that water would sometimes move from

the wetland to the ditch and that "drainage cuts that run through that berm" would facilitate such flow. C.A. App. 639. The question whether the CWA encompasses wetlands that lack any hydrologic connection to other covered waters therefore is not properly presented in this case.

2. Petitioners contend (Pet. 14-15) that review by this Court is warranted to resolve the question whether the CWA covers wetlands that are adjacent to non-navigable tributaries of traditional navigable waters, or only wetlands that are adjacent to the traditional navigable waters themselves. Petitioners did not argue in the court of appeals that wetlands adjacent to non-navigable tributaries are excluded from the CWA's coverage. And while the court of appeals referred briefly (see Pet. App. 10a) to its prior rejection of a similar argument in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004) (*Rapanos I*), the court did not otherwise address the question. This Court should therefore decline to address petitioners' claim. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *United States* v. *Lorasco*, 431 U.S. 783, 788 n.7 (1977). In any event, that claim lacks merit.[3]

a. Petitioners refer in passing (Pet. 15) to this Court's statement in *SWANCC* that CWA coverage does not "extend[ ] to ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. The Court was allud-

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[3] During the 2003 Term, this Court denied three petitions for writs of certiorari that raised substantially similar claims. See *Newdunn Assocs., LLP* v. *United States Army Corps of Eng'rs*, 541 U.S. 972 (2004) (No. 03-637); *Deaton* v. *United States*, 541 U.S. 972 (2004) (No. 03-701); *Rapanos* v. *United States*, 541 U.S. 972 (2004) (No. 03-929). There is no reason for a different result in this case.

ing to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[4]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to navigability). Finally, under a contrary interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tribu-

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[4] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

taries that are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*, which held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

b. Petitioners fail to identify a square conflict among the courts of appeals on the question whether wetlands adjacent to nonnavigable tributaries of traditional navigable waters fall within the CWA's coverage. Petitioners' reliance (Pet. 14-15, 20-21) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, when that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there

was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. Because the case did not involve a discharge into wetlands, the Fifth Circuit had no occasion to define the circumstances in which wetland areas can properly be treated as part of the "waters of the United States." In particular, the court in *Rice* did not discuss either (i) whether the CWA encompasses wetlands adjacent to a nonnavigable tribu-

tary of a traditional navigable water, or (ii) whether the presence of a berm or similar barrier precludes treatment of a wetland as "adjacent" to a neighboring water body. The decision in *Rice* therefore is not inconsistent with the Sixth Circuit's ruling here.

For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), see Pet. 14-15, 20-21, does not squarely conflict with the Sixth Circuit's decision in this case. *Needham*, like *Rice*, involved a suit under the OPA. 354 F.3d at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in *Rapanos I* and *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navi-

gable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water.[5] Nor did the court in *Needham* consider the application of the CWA to wetlands of any sort. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case in which the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

3. Petitioners contend (Pet. 5, 24-28) that Congress lacks authority under the Commerce Clause to regulate discharges of pollutants into the wetland at issue in this case. Petitioners did not raise that claim in the court of appeals, nor did the court address any constitutional question. Petitioners' Commerce Clause challenge therefore is not properly preserved for review by this Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

In any event, every court of appeals that has addressed the question has held that the CWA may constitutionally be applied to nonnavigable tributaries and

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[5] Under the regulations, "adjacency" is relevant only to wetlands, not to tributaries. 33 C.F.R. 328.3(a)(5) and (7); 40 C.F.R. 230.3(s)(5) and (7).

their adjacent wetlands.[6] This Court and others have long recognized Congress's power to regulate pollutant discharges into waters that are not themselves navigable where such regulation is reasonably necessary to maintaining the quality of traditional navigable waters. Petitioners' constitutional claim lacks merit and does not warrant this Court's review.

a. Because the Corps' exercise of regulatory authority over adjacent wetlands and discharges serves the federal goals of protecting navigability and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)—and that power "carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional tests of navigability, based on their connec-

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[6] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd*).

tions to traditional navigable waters. See 474 U.S. at 133.[7] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulations, petitioners do not question Congress's constitutional authority to regulate pollutant discharges into wetlands that have hydrologic connections to traditional navigable waters and their tributaries. Instead, petitioners' constitutional argument is based on the contention that the wetland at issue here lacks a hydrologic connection to any other water. See Pet. 24-28. As explained above, however (see pp. 9-10, *supra*), petitioners' characterization of the facts is unfounded. Accordingly, review is not warranted.

b. Petitioners' reliance (Pet. 25-26) on this Court's decision in *Lopez* is misplaced. *Lopez* considered the validity of a federal statute under the third of three categories of permissible Commerce Clause legislation identified by the Court, *i.e.*, the regulation of activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. Contrary to petitioners' contention (Pet. 26), the present case involves legislation falling within the first category of permissible Commerce Clause legislation identified by the Court, *i.e.*, regulation of the use of the channels of interstate commerce. *Id.* at 558. As the court in *Deaton* correctly concluded, Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," 332 F.3d at 706, and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals

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[7] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system may have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. See, *e.g.*, *Ashland Oil*, 504 F.2d at 1326.

in protecting navigable waters," *id.* at 707. *Lopez* does not undermine that conclusion.

Moreover, even with respect to legislation falling within the third *Lopez* category, a reviewing court need only find that a "rational basis exist[s] for concluding" that a regulated activity substantially affects interstate commerce. 514 U.S. at 557. Here, there is considerably more than a "rational basis" for concluding that discharges of pollutants into wetlands that are adjacent to nonnavigable tributaries of traditional navigable waters have a substantial effect, in the aggregate, on the downstream navigable waters. See *id.* at 558. As a general matter, the harm caused by discharges of dredged or fill material into wetlands includes, but is not limited to, the release of sediment downstream. An even greater harm arises from the *filling* of wetlands, which, as a general matter, reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135. And the Corps found that petitioners' filling of the wetland at issue here would result in just such harm. Pet. App. 70a-71a; see *id.* at 5a.

c. Petitioners contend that, if the CWA is construed to cover the wetland at issue in this case, the Act would "intrude upon the states' primary power to regulate land and water use." Pet. 27. That contention lacks merit. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant (including dredged spoil, sand, and rock) from a point source. Other functions and activities relating to land use remain in the hands of local authorities.

In any event, the federal government possesses long-standing and well-established power to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See p.16, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioners seek a CWA permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
KELLY A. JOHNSON
Acting Assistant Attorney General
GREER S. GOLDMAN
TODD S. KIM
Attorneys

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No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

CURRY & TAYLOR • WASH D.C. • (202) 333-3160 • USSCINFO.COM

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I

PETITIONERS' PROPERTY LACKS A HYDROLOGICAL CONNECTION WITH ANY FEDERAL WATERS AND THEREFORE IS NOT SUBJECT TO REGULATION UNDER THE CLEAN WATER ACT

The most notable aspect of Respondents' brief in opposition is that it does not even attempt to refute Petitioners' primary legal argument: that a wetland, such as the one on Petitioners' property, cannot be subject to regulation under § 404 of the Clean Water Act, 33 U.S.C. § 1344, ("CWA" or "the Act), when it lacks a hydrological connection with federal waters. Instead, Respondents attempt to avoid directly addressing this argument by asserting that the wetland on Petitioners' property has a hydrological connection to federal waters. Because Respondents' factual assertions are contrary to the record evidence and because Respondents do not address the legal error reflected in the court of appeals' decision, Respondents have not shown why this Court should not take jurisdiction of this case.

Respondents state that "the wetland on petitioners' tract has at least an occasional hydrologic connection to . . . Lake St. Clair, a traditional navigable water" because the United States Army Corps of Engineers ("the Corps") found – and the lower courts agreed – that a berm prevents the "immediate drainage" of the wetland to an adjacent tributary of Lake St. Clair. (*See* Brief in Opposition at 9). This statement does not accurately describe the evidence in the administrative record or the findings by either the Corps or the lower courts.

In fact, as Petitioners have noted, the Corps actually made a contrary finding during the administrative proceedings in this case. In its permit evaluation, which is part of the administrative record, the Corps discussed whether the wetland on Petitioners' property was connected to the Sutherland-Oemig Drain, which is the nearest tributary of Lake St. Clair, and the Corps found that "the parcel is not currently part of the S-O Drain watershed." (Petition at 52a) (quoted in the opinion of the district court). The Random House Dictionary of the English language defines "watershed" as, among other things, "the region or area drained by a river, stream, etc." Similarly, a website of Respondent United States Environmental Protection Agency ("EPA") defines "watershed" as "the area of land where all of the water that is under it or drains off of it goes into the same place." *See* http://www.epa.gov/owow/watershed/whatis.html. Given these definitions, the Corps' finding that the wetland was not part of the watershed for the Sutherland-Oemig Drain is, in essence, a finding that there is no ground or surface water connection between Petitioners' wetland and the Sutherland-Oemig Drain. And if there is no hydrological connection between the wetland and the Sutherland-Oemig Drain, there is no hydrological connection between the wetland and any federal water. The undisputed facts in the record show that the Sutherland-Oemig Drain is the only conduit for water from Petitioners' property to anything that comes within the jurisdiction of the CWA. Consequently, during the administrative phase of this case, the Corps essentially found that Petitioners' property is hydrologically isolated from any federal

water, and the district court's opinion adopted that finding.[1]

Respondents first attempted to obscure the Corps' unequivocal finding in their brief to the Sixth Circuit, where they contended, as they do in this Court, that it was possible for water to accumulate in the wetland so that it overtopped the berm separating the wetland from the Sutherland-Oemig Drain. (Respondents' Court of Appeals Brief at 8). The problem with this argument is that it is not based upon any finding actually made by the Corps or the district court; it is a theoretical postulation, which is not directly supported by any evidence. There is nothing in the record to show any finding or even any suggestion by a factfinder that water had ever overtopped the berm at any time. Respondents' contention about the prospects for drainage is pure speculation.

Contrary to Respondents' assertions, Petitioners' counsel has not endorsed this contention or conceded that it was true. Respondents insist that, during the administrative appeal hearings, Petitioners' counsel asserted that water could overtop the berm or flow through cuts in the berm and enter the Sutherland-Oemig Drain, but this is a misleading characterization of statements by Petitioners' counsel, which takes them entirely out of context. (Brief in Opposition at 9-10). In the portion of the

[1] In the state adminsitrative proceedings, which occurred before Petitioners' permit application to the Corps, the Michigan Department of Environmental Quality also found that there was no hydrological connection between the wetland and Lake St. Clair or any other body of water. (Court of Appeals Joint Appendix at 697).

administrative appeal hearing cited by Respondents, the parties were discussing Petitioners' proposal of a water retention pond as part of their development plan for the Property. Reciting the various advantages of the plan, Petitioners' counsel noted that the proposed water retention pond would actually have a greater capacity for holding water run-off than the existing wetland. (Court of Appeals Joint Appendix at 639). Petitioners' counsel never asserted that water had ever overtopped the berm or otherwise flowed from the wetland into the Sutherland-Oemig Drain; he asserted that the theoretical water-holding capacity of the proposed retention pond was greater than the theoretical water-holding capacity of the existing wetland. (*Id.*). Consequently, the statement by Petitioners' counsel to which Respondents cite does not constitute a concession of the factual proposition that there is a hydrological connection between the wetland and Lake St. Clair. If there were any concessions on this point at the administrative appeal hearing, they were made by the Corps. On the same page of the administrative record cited by Respondents, an official of the Corps asserted "right now there is no outflow. Essentially it is off-line, if you will." (*Id*). That is, the Corps admitted that the wetland is currently not part of the existing watershed. Thus, not only does this portion of the record fail to support Respondents' assertions about the existence of a hydrological connection, it actually refutes Respondents' assertions and clarifies the fact that, until Respondents' briefing in the court of appeals, the Corps had consistently taken the position that the wetland did not have a hydrological connection to Lake St. Clair or any part of the Lake St. Clair watershed.

Just as Petitioners have not conceded that there is a hydrological connection between the wetland and the Lake St. Clair watershed, the court of appeals did not, as Respondents suggest, find that any such hydrological connection existed. Respondents are correct in pointing out that the court of appeals asserted that there was no "immediate drainage" from the wetland to the adjacent drainage ditch and ultimately to the Sutherland-Oemig Drain. (*See* Petition at 3a). But the court of appeals' assertion that there was no "immediate drainage" does not necessarily lead to the conclusion that there must have been some drainage from the wetland. Respondents' interpretation of the court of appeals' statements cannot be substituted for the statements that the court of appeals actually made, which were anything but a finding that there was a hydrological connection.

By making such strenuous efforts to show the existence of a hydrological connection in this case, Respondents tacitly acknowledge the novelty of the Sixth Circuit's opinion here and its departure from the rulings of other circuit courts, not to mention from the principles established by this Court in *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). As Petitioners have argued, the principles of *SWANCC* as well as the rulings of the other circuit courts establish that there cannot be a "significant nexus" between a wetland and federal waters unless there is, at an absolute minimum, a hydrological connection between the two. With the exception of the court of appeal's opinion here and two opinions by the district court for the Northern District of California, every other federal court that has addressed this issue has concluded that a

wetland is subject to regulation under the CWA only if there is, at the very least, a hydrological connection between that wetland and federal waters. In their Brief in Opposition, Respondents never even attempt to explain how a wetland can properly be subject to regulation under the CWA in the absence of such a connection. Thus, Respondents do not contest Petitioners' most fundamental legal argument: that the court of appeal's opinion here establishes new – and erroneous – precendent regarding the scope of federal authority under the CWA.

The court of appeals' opinion creates confusion and conflict in federal law, and it is contrary to the principles established by this Court for the definition of the scope of federal authority under the CWA. As this Court has held, the fundamental purpose of the CWA is regulate waters and wetlands to the extent necessary to maintain the integrity of federal waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-35 (1985). When a wetland has no hydrological connection with any federal waters, its regulation cannot affect the integrity of federal waters in any way, and, therefore, it cannot fall within the scope of the CWA. Consequently, this Court should take jurisdiction of this case and correct the Sixth Circuit's erroneous decision to improperly expand the scope of the CWA.

II

THE CIRCUIT SPLIT CREATED BY THE SIXTH CIRCUIT'S DECISION HERE REQUIRES REVIEW BY THIS COURT BECAUSE IT IMPLICATES OTHER DIFFERENCES AMONG THE CIRCUITS REGARDING THE SCOPE OF FEDERAL AUTHORITY UNDER THE CWA

As noted above, when the court of appeals concluded that Petitioners' wetland could be regulated under the CWA even though it lacked a hydrological connection to federal waters, it created a split with the other courts of appeal that have ruled that a hydrological connection is the absolute minimum requirement for CWA jurisdiction. This circuit split has implicated another division of opinion among the circuit courts, regarding whether the CWA covers wetlands that are adjacent to non-navigable waters. Respondents insist that this Court should disregard this second division of opinion because Petitioners did not raise an argument on this point in the court of appeals and because the court of appeals' decision did not address this issue, but this issue is, in fact, directly relevant to this case and is an additional reason for granting the petition here.

As an initial matter, Petitioners have properly presented the question whether the court of appeals' opinion here contributes to confusion about the scope of federal jurisdiction under the CWA. In their briefs in both the district court and the court of appeals, Petitioners took the position that allowing the Corps to regulate their wetland was contrary to every federal appellate ruling regarding the scope of federal authority under the CWA, including rulings by the

Fourth, Fifth, Sixth and Ninth Circuits. In explaining this position, Petitioners pointed out that all of these courts had required a hydrological connection as the minimum for CWA jurisdiction, but that the Fifth Circuit's understanding of the scope of CWA jurisdiction differed from that of the other courts, and both the district court and the court of appeals noted this point. (Petition at 10a & 44a-45a). Indeed, the district court even understood Petitioners to be advocating for the adoption of the Fifth Circuit's rule. (*See* Petition at 45a).

Moreover, regardless of whether Petitioners specifically discussed the differences between the Fifth and other circuits on this issue, Petitioners certainly preserved the right to discuss all aspects of this issue by raising their general arguments about the scope of federal authority under the CWA. This Court has held that parties are not limited in this Court to reiterating the precise arguments that they raised in the lower courts. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. *Id.* at 535. By discussing the general confusion of the law regarding CWA jurisdiction, Petitioners have certainly raised questions that make the Fifth Circuit's rulings relevant to the fundamental question presented here.

III

PETITIONERS HAVE NOT WAIVED ANY ARGUMENTS REGARDING WHETHER THE COURT OF APPEALS' INTERPRETATION OF THE CWA IS CONSISTENT WITH THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Respondents also argue that Petitioners have failed to adequately preserve their right to argue that the court of appeals' interpretation of the CWA is not consistent with this Court's recent definition of the scope of congressional authority under the Commerce Clause of the United States Constitution. Here again, Respondents' arguments are unavailing because Petitioners specifically raised this issue in the lower courts. (*See* Petitioners' Court of Appeals Brief at 28-30). In any event, Petitioners' arguments about the proper scope of congressional authority regarding the regulation of intrastate wetlands is inextricably intertwined with their arguments about the proper scope of federal authority under the CWA. Both arguments implicate fundamental questions about what Congress was permitted to do or about what it actually did do in enacting the CWA. Consequently, when Petitioners raised an issue about what may be lawfully regulated under the CWA, they raised an issue that implicates both the proper interpretation of the statute itself and the scope of congressional authority to enact such a statute. According, under the principles identified in *Yee*, *supra*, Petitioners have properly raised this issue, and this Court may consider it as an additional reason for granting the petition.

Respectfully Submitted,

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

(2)

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In The

Supreme Court of the United States

JUNE CARABELL, *ET AL.*

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

Duane J. Desiderio
(Counsel of Record)
Thomas J. Ward
Felicia K. Watson
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 220,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are frequently subject to regulations under the Clean Water Act ("CWA"). In that regard, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, advises its members on compliance issues, and, unfortunately, has been witness to numerous situations where federal regulators have attempted to expand the scope of their authority beyond congressionally authorized parameters. NAHB has thus been before the Court as *amicus curiae* or "of counsel" in a number of cases involving landowners who have been aggrieved by government over-regulation under the CWA and other statutes and programs.[2]

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[1] Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v.*

SUMMARY OF THE ARGUMENT

1. ***Circuit Conflict:*** There is a conflict between the courts of appeal on the proper test for determining when a non-navigable feature is a "navigable water"[3] under the Clean Water Act ("CWA" or the "Act").

• The Sixth Circuit, in its decision below, has upheld the authority of the U.S. Army Corps of Engineers ("Corps") over a non-navigable wetland simply because it was near non-navigable ditches that may be connected to navigable waters. Under this "mere proximity" approach – which

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Yolo County, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Fal', v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108); *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir.), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163); and *San Remo Hotel, L.P. v. City & County of San Francisco*, 364 F.3d 1088 (9th Cir.), *cert. granted in part*, 125 S. Ct. 685 (U.S. Dec. 10, 2004) (No. 04-340).

[3] Unless permitted, the CWA prohibits discharges of pollutants from point sources into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" is defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

stretches CWA jurisdiction far beyond the limits of any prior court of appeals decision (including the Sixth Circuit's past precedents) – there is no need for the Corps to prove any surface hydrological connection between wetlands and navigable waters, or that the wetlands are physically adjacent (*i.e.*, touching) navigable waters. It is simply enough for the Corps to show that wetlands were somewhere in the vicinity of surface aquatic features, as the basis to prop-up CWA jurisdiction.

- On other occasions, the Sixth Circuit has followed the Fourth Circuit's "hydrological connection" theory for CWA jurisdiction. Under this approach, the Corps and the Environmental Protection Agency ("EPA") assert authority over non-navigable features like ordinary ditches, drains, and swales, merely if they have some "hydrological connection" to navigable waters. As a practical matter, the hydrological connection theory supports an expansive, virtually limitless basis for CWA jurisdiction; it enables federal regulators to control non-navigable features in the landscape, simply if a drop of water in them could, potentially, reach navigable waters.

- The Fifth Circuit has expressly rejected the "hydrological connection" theory as the basis for CWA jurisdiction. Instead, it requires a "direct, proximate" connection between non-navigable and navigable waters, and has thus extended CWA jurisdiction only if a water is actually navigable or physically adjacent thereto.

- The Second Circuit takes another approach. It recently held that the assertion of federal CWA jurisdiction requires the showing of an "actual discharge" of pollutants into navigable waters. It thus requires more than physical proximity or a "hydrological connection" to navigable

waters, but does not restrict CWA jurisdiction to actually navigable waters and abutting non-navigable features.

2. ***Regulatory Confusion:*** Not surprisingly, the split in the courts has manifested itself as chaos in the field. According to a report issued by the United States General Accounting Office,[4] "three different district staff" of the Corps would likely make "three different assessments" as to whether a particular non-navigable feature (like a drainage ditch or a dry wash) is subject to CWA jurisdiction. *See* GAO Report at 23. With no guidance forthcoming from the Corps or EPA, this Court is the only realistically available forum to make sense of the judicial quagmire and explain to landowners and regulatory agencies what kinds of non-navigable features fall within (and outside) the CWA.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON THE SCOPE OF CWA JURISDICTION OVER NON-NAVIGABLE FEATURES.

Since the decision in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), five petitioners, in six separate petitions, have sought assistance from this Court on the extent to

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[4] U.S. General Accounting Office, Report to the Chairman, Subcomm. on Energy Policy, Natural Resources & Regulatory Affairs, Comm. on Gov't Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 27, 2004) ("GAO Report").

which the CWA encompasses non-navigable features as statutory "navigable waters."[5]

A. As the Sixth Circuit Previously Recognized, Determining the "Precise Boundary" of Areas Covered by the Clean Water Act Remains "Difficult."

Just prior to its decision in *Carabell*, the Sixth Circuit went to great lengths to identify and discuss the contradictory appellate cases on CWA jurisdiction. *United States v. Rapanos*, 376 F.3d 629, 638-42 (6th Cir. 2004) (*Rapanos II*). That decision pointedly recognized that determining the "precise boundary of which waters are covered by the CWA has been difficult." *Rapanos II*, 376 F.3d at 636.[6] The court of appeals believed that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC*, "the two leading Supreme Court cases on the reach of the CWA[,] have done little to clear the muddied waters of CWA jurisdiction." 376 F.3d at 365.

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[5] *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. April 11, 2005) (No. 04-1384); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. January 28, 2005) (No. 04-1034) ("*Rapanos II*" (civil appeal)); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004) ("*Rapanos I*"(criminal appeal)); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004) ("*Deaton*"); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 416 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003).

[6] "Determining which wetlands are considered 'adjacent to' traditional navigable waters or their tributaries has proved to be a complication in defining CWA jurisdiction." 376 F.3d at 636. And again, the court of appeals stated: "Determining how much of a connection is necessary has proven difficult." *Id.*

What this Court meant by "adjacent" in *Riverside Bayview*, and "significant nexus" in *SWANCC*, have become the million dollar questions confronting the lower courts as they grapple with deciding whether and when the CWA encompasses non-navigable features.

B. Sixth Circuit: "Mere Proximity" to Non-Navigable Ditches That May be Connected to Navigable Water.

Aside from the Sixth Circuit's decision below, none of the courts of appeals has ever held that mere proximity alone between a wetland and a non-navigable ditch provides the basis for CWA jurisdiction—without some kind of hydrological connection between those features and navigable waters. In *Carabell*, the record showed that the forested wetlands were separated by a "clay ridge [which] prevent[ed] water from the forested area of the property from draining into the ditch." 257 F. Supp. 2d at 919. It was "undisputed that the property does not have a surface water connection to any adjacent property or any adjacent body of water," and that "the water that is periodically present in the forested portion of the property does not drain to the Sutherland-Oemig drain or to any body of water...." (*Id.*) Furthermore, the district court found it was "crucial to the [administrative law judge's] ruling that *the property was isolated from any body of water.*" *Id.* (emphasis supplied).

Despite the *Carabell* wetland's isolation from any water, the Corps contended that "*SWANCC* does not hold that a direct hydrological connection is required to establish jurisdiction based on adjacency." *Id.* at 927-28. In effect, the Corps asserted jurisdiction over the wetlands merely

because they were *near* non-navigable waters, not because of any hydrologic connection between them. Both the district court and the court of appeals upheld the Corps's authority in this case based on the "mere proximity" theory.

However, neither *Riverside Bayview* nor *SWANCC* support the "mere proximity" theory. The *Riverside Bayview* Court upheld jurisdiction over "adjacent" wetlands because it discerned a congressional intent to regulate wetlands that are "inseparably bound up with the 'waters of the United States.'" 474 U.S. at 134. The Court emphasized that the wetlands in that case, described as "80 acres of low-lying marshy land," "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 124, 135. The *SWANCC* Court also stressed that the *Riverside Bayview* wetlands "actually abutted on a navigable waterway," and further observed that its' holding in *Riverside Bayview* "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. *SWANCC* reinforced the need for an "inseparable" relationship between non-navigable and navigable resources: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" *Id.* (emphasis added). Accordingly, finding no inseparable relationship between the non-navigable, isolated ponds at issue in *SWANCC* and a body of "open water," this Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under Section 404(a) of the CWA." *Id.* at 174.

In short, the assertion of CWA jurisdiction over the wetlands at issue in this case contravenes both *Riverside Bayview* and *SWANCC.* Unlike the jurisdictional wetlands

in *Riverside Bayview,* the *Carabell* wetlands do not actually abut an open water. For that matter, the *Carabell* wetlands do not actually abut a non-navigable water, either. And like the non-jurisdictional ponds in *SWANCC,* the *Carabell* wetlands are physically isolated from other surface aquatic features (here, by a berm) and thus lack the requisite "significant nexus" to navigable waters.

C. Fourth and Sixth Circuits: "Hydrological Connection" to Navigable Waters.

In an earlier opinion (that is also the subject of a pending petition for writ of *certiorari*), the Sixth Circuit followed the Fourth Circuit in extending CWA jurisdiction to all areas with "the presence of a hydrologic connection." *Rapanos II,* 376 F.3d at 639 (citing with approval *United States v. Rapanos,* 339 F.3d 447, 453 (6th Cir. 2003), and *United States v. Deaton,* 332 F.3d 698, 711-12 (4th Cir. 2003)). It further held: "Non-navigable waters must have a *hydrological connection or some other 'significant nexus'* to traditional navigable waters in order to invoke CWA jurisdiction." *Rapanos II,* 376 F.3d at 642 (emphasis added).

As in the present case,[7] in *Deaton* and *Rapanos I* and *II*, the Corps asserted federal authority over remote drainage ditches that were miles away from navigable waters. *Deaton,* 332 F.3d at 712; *Rapanos I,* 339 F.3d at 452-53. Both circuits have accepted as proper the Corps's apparent unrestricted ability to exert regulatory jurisdiction

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[7] The Carabells' property is some distance away from navigable-in-fact waters and more fully described in the district court's opinion. *See, e.g., Carabell v. U.S. Army Corps of Eng'rs,* 257 F. Supp. 2d 917, 918-19 (E.D. Mich. 2003).

"over the whole tributary system of any navigable waterway []." *Deaton*, 332 F.3d at 712; *Rapanos I*, 339 F.3d at 452-53. In *Deaton*, for example, the Fourth Circuit reasoned that "any branch of a tributary system [including ditches] that *eventually flows* into a navigable body of water" is subject to CWA requirements. 332 F.3d at 711, 712 (emphasis added). Similarly, in *Rapanos I*, the Sixth Circuit held that there was "an ample nexus to establish jurisdiction" because Mr. Rapanos's wetlands were "adjacent" to a drain and a river – "adjacent" not because of any physical proximity to navigable-in-fact waters, but by virtue of a remote and distant hydrological connection between the wetlands and navigable-in-fact waters. *Rapanos I*, 339 F.3d at 453. In *Rapanos II*, the Sixth Circuit stayed its course and again adopted the Fourth Circuit's "eventually flows" analysis from *Deaton*. *Rapanos II*, 376 F.3d at 639-40 (citing *Deaton*, 332 F.3d at 711-12).

In short, the Fourth and Sixth Circuits have justified federal CWA regulation simply upon *the potential* that a single molecule of water could be emitted from a non-navigable feature and traced across the landscape, so that it *may flow* into a traditional navigable water. Under this theory, it is irrelevant whether the connection between non-navigable features and navigable waters is continuous; whether that connection is natural or man-made; whether the connection is at the surface or subterranean; how long that connection is; whether pollutants traverse through a hydrologic connection and ultimately flow into navigable waters; or, for that matter, whether, when, or how much water exists in such a connection. Under the Fourth and Sixth Circuits' view, jurisdiction is supported by a limitless "hydrological connection" theory.

Thus, while the major premise underlying *Riverside Bayview* and *SWANCC* is a "significant nexus" to navigable waters, the "hydrological connection" theory is premised on something less. The purposeful choice of words selected by the Fourth and Sixth Circuits disserves, both textually and substantively, this Court's "significant nexus" requirement. In *Deaton*, the Fourth Circuit found "*a* nexus" sufficient, reading *SWANCC* as "*suggesting* that covered non-navigable waters are those with *'some connection'* to navigable ones." *Deaton*, 332 F.3d at 709 (emphasis supplied). *Rapanos I*, relying heavily on *Deaton*, found an "ample nexus" sufficient. *Rapanos I*, 339 F.3d at 453. In *Rapanos II*, the Sixth Circuit approved these previous holdings. 376 F.3d at 642. However, this Court never premised CWA jurisdiction on "a" nexus, "some" connection, "eventual[] flows" or a "hydrologic connection." Instead, this Court applied the "significant nexus" doctrine.

D. Fifth Circuit: "Actually Navigable Waters" and Waters "Truly" Adjacent to Them.

Contrary to its sister circuits in *Deaton* and *Rapanos I* and *II*, the Fifth Circuit has issued decisions more faithful to *SWANCC* and *Riverside Bayview*. On two occasions, the Fifth Circuit has flatly rejected the Corps's overbroad interpretation that CWA navigable waters encompass "all waters ... that have any hydrological connection with 'navigable water.'" *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("*Needham*") (citing 40 C.F.R. § 300.5 (2003)). *See also Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5th Cir. 2001) ("*Rice*"). Recognizing that the Fourth Circuit in *Deaton*, 332 F.3d at 702, and the Sixth Circuit in *Rapanos I*, 339 F.3d at 449, agreed with the

government's "expansive treatment," the Fifth Circuit countered by holding as follows:

> In our view, [the government's] definition [of "navigable waters"] is unsustainable under *SWANCC*. The CWA ... [is] not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor *truly adjacent* to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation ... *if the body of water is actually navigable or adjacent to an open body of navigable water.*"

Needham, 354 F.3d at 345-46 (internal citations omitted, emphasis added) (citing *Rice*, 250 F.3d at 269). *See also FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D. N.J. 2003) (holding proper analysis is the "significant nexus" test and expressly rejecting "hydrological connection" test).

Needham entrenches the view earlier announced by the Fifth Circuit in *Rice*, where it interpreted *SWANNC* and *Riverside Bayview* and held that "a body of water is subject to [CWA] regulation ... if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The *Rice* court found nothing to indicate that the creek at issue, or other unnamed intermittent creeks, were "sufficiently linked" to navigable-in-fact water. *Id.* at 271. The Fifth Circuit thus held that there must be "a close, direct and proximate link between ... [the] discharges of oil and any resulting actual, identifiable

oil contamination of natural surface water that satisfies the jurisdictional requirements of the [CWA]." *Id.* at 272.

Moreover, *Needham* reaffirmed the Fifth Circuit's *actual* adjacency requirement from *Rice,* when it held "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway." *Needham,* 354 F.3d at 346 and n.12 (citing *SWANCC,* 531 U.S. at 167; identifying the Corps's definition of "adjacent" as "bordering, contiguous, or neighboring" in 33 C.F.R. § 328.3, and recognizing partial invalidation of that regulation by *SWANCC*).

E. Second Circuit: "Actual Discharge" of Pollutants to Navigable Waters.

The Second Circuit Court of Appeals has recently offered another mode of analysis to determine the extent of CWA jurisdiction. In *Waterkeeper Alliance, Inc. v. U.S. Envtl. Protection Agency,* 399 F.3d 486 (2d Cir. 2005), the court reviewed an EPA rule establishing CWA Section 402 permit requirements for discharges of water pollutants from concentrated animal feeding operations (the "CAFO Rule"). Industry groups brought a facial challenge, arguing that the CAFO Rule was illegal because it sought to establish a duty to apply for a Section 402 permit[8] simply for a *potential* to

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[8] The Act's main permit provisions are Sections 402 and 404. Section 402 requires permits for the discharge of pollutants. 33 U.S.C. § 1342. Section 404 requires permits for the discharge of a specific type of pollutant, namely, dredged or fill material. *Id.* § 1344. The jurisdictional polestar for both permits is a "discharge," which means "any addition of any pollutant into *navigable waters*...." 33 U.S.C. § 1362(12) (emphasis supplied).

discharge pollutants. *Id.* at 504. The Second Circuit found that the CAFO Rule violated the CWA's statutory scheme because:

> In the absence of an *actual addition* of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, ... and no statutory obligation of point sources to seek or obtain [a CWA] permit in the first instance.

Id. at 505 (emphasis supplied).

Thus, the Second Circuit emphasizes that the requirement to obtain a CWA permit depends on an *actual* discharge of pollutants to navigable waters, not a mere hydrological connection to navigable waters. In other words, it is not simply the *possible* addition of *water* to "navigable water," but the *actual* addition of *pollutants* to "navigable water," that triggers CWA permitting requirements in the Second Circuit.

The "actual discharge" standard from *Waterkeeper Alliance* is at odds with *Deaton*, where the Fourth Circuit upheld federal jurisdiction on the reasoning that a discharge of pollutants into a non-navigable ditch "*has the potential* to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707 (emphasis supplied); *id.* at 711 (CWA jurisdiction "extends to any branch of a tributary system that eventually flows into a navigable body of water"). As the petition for *certiorari* to this Court in *Deaton* made clear, "there [was] nothing in the record to suggest that dirt from the Deatons' ditch-digging ... reached and degraded the Wicomico River." Petition for Writ of *Certiorari* at 8, *United States v. Deaton*, 332 F.3d

698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). For that matter, there was no evidence in *Deaton* (or in *Carabell,* or *Rapanos I or II*), that dirt even left the sites at issue. Nonetheless, to mobilize its expansive "hydrological connection" theory over non-navigable features, the Fourth and Sixth Circuits have found it unnecessary to justify CWA jurisdiction by requiring an actual discharge of pollutants to navigable waters.

* * *

The divergent tests proffered by the courts of appeals can be understood as analogous to variant levels of causation. The loosest causal relationship is represented by the Fourth and Sixth Circuit's "but for" approach, where non-navigable features are deemed jurisdictional because they are geographically near (but isolated from) navigable waters, or because water in non-navigable features may potentially reach "navigable waters" via a remote hydrologic connection. The Second Circuit has established a more proximate approach as the basis for CWA jurisdiction, requiring an addition of pollutants (not simply physical closeness or a possible contribution of hydrology) to navigable waters.[9] And the Fifth Circuit requires the highest causal nexus, extending CWA authority only over actually navigable waters and non-navigable features that physically touch them. This Court is uniquely well-equipped to assist the lower courts with "difficult questions of proximity and degree," and has done so particularly with regard to the scope of regulatory jurisdiction under federal environmental laws. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687, 708 (1995). *See also id.* at 712-

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[9] *See* W. Page Keeton *et al., Prosser and Keeton on Torts* §§ 41-42 (5th ed. 1984) (discussing the various connections between an act and damage "caused" by the act).

713 (O'Connor, J., concurring) (using concept of proximate cause to sustain Endangered Species Act "harm" regulation, based on the regulation's textual requirement of "actual[]," as opposed to possible, death or injury to species). Respectfully, the Court should issue the writ of *certiorari* to clarify the level of "proximity and degree" that a non-navigable feature must bear in relation to a "navigable water," before the Corps and EPA can assert the awesome authority they possess under the CWA.

II. THE CONFUSION CREATED BY THE REGULATORY AGENCIES IN THE FIELD SHOULD COMPEL THIS COURT'S INVOLVEMENT.

A. Congress Has Recognized the Agencies' Haphazard Implementation of "Navigable Waters" Jurisdiction.

Congress and the agencies have continually struggled with the extent of CWA jurisdiction ever since this Court's 2001 decision in *SWANCC*. Indeed, Congress held a hearing on the regulatory implications of *SWANCC*, which led to a promise from the Corps and EPA that they would clarify the scope of CWA jurisdiction to benefit both their field offices and the regulated community. But the agencies have broken their promise. They have issued no meaningful regulatory guidance to date, and none is expected or forthcoming.

In 2002, the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, chaired by Representative Doug Ose, held a hearing concerning EPA and Corps implementation of this Court's *SWANCC* decision. *See Agency Implementation of the SWANCC*

Decision: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the Comm. on Gov't Reform, No. 107-230, 107th Cong. 2d Sess. (2002) (statement of Rep. Doug Ose, Chairman) ("Subcomm. Hearing"). During that hearing, Representative Ose recognized that the agencies' different approaches to determining CWA jurisdiction have "resulted in widely varying interpretations of the scope of jurisdiction...." *Id.* at 2. Furthermore, Representative Ose explained that the "current situation is creating confusion and chaos" for the States,[10] because the lack of agency guidance "hinders States in their ability to implement their own programs to protect wetlands." *Id.* To address the confusion, the EPA and Corps repeatedly agreed to conduct a rulemaking to clarify their position regarding CWA jurisdiction. Subcomm. Hearing at 32, 36, 38, 41, 53.

Things appeared hopeful in 2003, when the Corps and EPA issued an Advanced Notice of Proposed Rulemaking to "ensure that the regulations are consistent with the CWA and the public understands what waters are subject to CWA jurisdiction." Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1993 (January 15, 2003) ("ANPR"). The agencies recognized that their

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[10] *See also* Brief of *Amici Curiae* of the Building Industry Legal Defense Foundation, *et al.* in Support of Petitioners at 2-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). *Amici Curiae* discussed specific examples of how regulators in California are "improperly asserting jurisdiction under the CWA." *Id.* at 2. They included in their brief a series of examples such as: (1) regulating a "vertical-walled box culvert as waters of the United States that are swimmable"; and (2) declaring that a municipal storm sewer system, including streets, curbs, and gutters, are CWA navigable waters. *Id.* at 5-7.

current regulations were causing confusion and that they needed to develop new regulations to "clarify[] what waters are subject to CWA jurisdiction." *Id.*

However, after receiving thousands of pages of public comments, the agencies announced that they would not move forward with rulemaking or otherwise issue any guidance at all to clarify the confusion. Through a press release, the EPA and Corps declined further agency action, stating:

> After soliciting public comment to determine if further regulatory clarification was needed, the EPA and Corps have decided to preserve the federal government's authority to protect our wetlands. The agencies will continue to monitor implementation of this important program to ensure its effectiveness.

See Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision (December 16, 2003), *available at* http://www.epa.gov/newsroom. The confusion still exists without any expected schedule for clarification from these agencies.

In light of the abandoned rulemaking on *SWANCC*, and without this Court's review, the lower courts have become the final arbiters on the scope of CWA jurisdiction. But, as shown above, they are in a state of disarray. Everyone – including the agencies – will anticipate and scrutinize every federal trial and circuit court opinion in the absence of reasoned agency decision-making. Indeed, the ANPR itself documented the divergent judicial views concerning those water bodies that are regulated under the

CWA and those that are not. In a blatant abdication of their responsibilities, the Corps and EPA directed their field staff to make jurisdictional decisions on a "case-by-case basis" by "considering the relevant court decisions." 68 Fed. Reg. 1991, 1998.

B. The General Accounting Office Has Reported on Rampant Regulatory Inconsistencies.

The U.S. General Accounting Office ("GAO") has issued a report confirming Congress's findings of regulatory inconsistency. *See* Report to the Chairman, Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs, Comm. on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,* GAO-04-297 (Feb. 27, 2004) (GAO Report).[11]

The GAO Report identifies and documents the different and often contradictory approaches, both among and within the Corps's districts, regarding whether a particular non-navigable feature qualifies as a "tributary" or an "adjacent" wetland. *Id.* at 20-22 and 17-20.[12] In addition, the GAO Report concludes that there is no consistency within the Corps on whether ditches and other man-made conveyances are subject to federal regulation.

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[11] Available at http://www.gao.gov/new.items/d04297.pdf.

[12] *See, e.g.*, GAO Report at 3 ("Districts apply different approaches"); *id.* ("differences in identifying jurisdictional limits"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 18 ("districts varied"); *id.* at 20 (districts "could differ significantly"); *id.* at 23 ("three different district staff" would probably make "three different assessments"); *id.* at 25 ("contrast" among districts).

Id. at 22-26. In effect, the GAO Report confirms that the Corps does not know what the word "tributary" means, or how to identify a "tributary" or an "adjacent" wetland in the field with any predictability or consistency. Furthermore, GAO found that few Corps districts actually disclose "their practices for making jurisdictional determinations to the public." GAO Report at 27.

Consequently, we are left with an inconsistent patchwork of jurisdictional determinations that is wholly unsupported by any rulemaking record or other documentation. Such ad hoc decision-making is precisely the kind of situation where *Chevron* deference is not due.[13] With no federal agency plans for a future rulemaking, and with the courts of appeal in conflict, the sole remaining venue to resolve these issues is this Court.

C. Whether Federal Regulators Assert CWA Jurisdiction Now Depends on the Geographic Jurisdiction of the Various Courts of Appeal, Not on a Consistent Regulatory Program.

Because the agencies have relied on divergent court decisions to direct the public, landowners are now confronted with geographically disparate applications of the CWA. This subjects them to significant criminal and civil penalties based solely upon where their land is situated. Thus, landowners in the Sixth and Fourth Circuit states of Kentucky, Michigan, Ohio, Tennessee, Maryland, Virginia, North Carolina, South Carolina and West Virginia are subject to over-regulation because federal jurisdiction is

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[13] *See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). The Fourth Circuit determined that *Chevron* deference was appropriate and held that "the word 'tributaries' ... means what the Corps says it means." *Deaton,* 332 F.3d at 711.

triggered if their property has "mere proximity," "some connection," or is "hydrologically connected," to traditionally navigable waters.

By contrast, areas in the Fifth Circuit states of Mississippi, Louisiana and Texas will be regulated under the CWA only if they physically abut an actually navigable water. And landowners in the Second Circuit states (New York, Connecticut, and Vermont) will be regulated not through the hydrological connection test, but only where pollutants are shown to migrate off their properties and result in an actual discharge to navigable waters.

CONCLUSION

The Sixth Circuit's opinion in *Carabell* does nothing to clarify this mess. Indeed, its "mere proximity" theory adds yet another "test" overall, and two within its own circuit.

The Supreme Court's involvement is urgently needed so the Corps can regulate with consistency and property owners know, up front, if the arm of the federal government properly reaches their land and triggers CWA permitting and penalty requirements.

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Respectfully submitted,

Duane J. Desiderio*
Thomas J. Ward
Felicia K. Watson
National Association of Home Builders
**Counsel of Record*

(3)

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In the

Supreme Court of the United States

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF JOHN A. RAPANOS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JUNE CARABELL, ET AL.

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae John A. Rapanos and Pacific Legal Foundation

QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2, John A. Rapanos and Pacific Legal Foundation respectfully submit this brief amici curiae in support of the Petition for Writ of Certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

John A. Rapanos owns several parcels in Bay County, Michigan. In an effort to develop his property for commercial use, he cleared and graded some of the property. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002). Though his parcels lie approximately twenty miles from the nearest navigable waterway, the United States asserted jurisdiction over the property and Mr. Rapanos was prosecuted for discharging fill into "waters of the United States" without a permit. *See id.* Mr. Rapanos was tried and convicted, fined $185,000, and sentenced to three years probation. *See id.* at 1013. The conviction was upheld on appeal, but this Court granted a writ of certiorari, vacated the conviction, and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *See Rapanos v. United States*, 533 U.S. 913 (2001).

On remand, the district court found that federal jurisdiction was improper after *SWANCC*, *see United States v. Rapanos*, 190 F. Supp. 2d at 1017, but the Sixth Circuit reversed that determination and further directed the trial court to increase the sentence to include a minimum of ten months in prison. *See United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). This Court denied Mr. Rapanos's subsequent

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

petition for a writ of certiorari, along with two similar cases. *See Rapanos v. United States*, *cert. denied*, 541 U.S. 972 (2004); *see also Newdunn Associates, LLP v. United States Army Corps of Engineers*, *cert. denied*, 541 U.S. 972 (2004); *Deaton v. United States*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). After Mr. Rapanos's case was remanded to the district court for sentencing, this Court issued a decision invalidating the United States Sentencing Guidelines. *See United States v. Booker*, 125 S. Ct. 738 (2005). The trial court then reinstated Mr. Rapanos's original fine and probation and the United States appealed that decision, ushering in the 13th year of this litigation. In 1994, in addition to the criminal penalties, the government filed civil charges against Mr. Rapanos seeking as much as $13 million in fines and mitigation. Mr. Rapanos again objected to the government's application of the Clean Water Act to the remote nonnavigable wetlands on his property, but the Sixth Circuit affirmed his liability on the same rationale that supported the criminal case. Mr. Rapanos filed a pending petition for writ of certiorari with this Court and thus has a significant stake in the determination of this case. *See Rapanos v. United States*, Docket No. 04-1034.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind. PLF litigates in support of the rights of individuals to make reasonable use of their private property and advocates a balanced approach to environmental issues. PLF supports the concept of limited government, the appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with other needs of society.

PLF has participated before this Court on several occasions involving interpretations of the jurisdictional reach of the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *SWANCC*, 531 U.S. 159, and *United States v.*

Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). PLF attorneys also represent John A. Rapanos on his petition before this Court which raises issues that are nearly identical to those in this case. *See Rapanos v. United States*, Docket No. 04-1034. PLF attorneys have also offered nonpartisan testimony before Congress on the scope of federal jurisdiction under the Clean Water Act. *See* Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 19, 2002). PLF's experience in this area will provide an additional, valuable, and informed viewpoint on the issues presented in this case

SUMMARY OF ARGUMENT

Since this Court's decision in *SWANCC* affirmed clear limits to the term "navigable waters" under the Clean Water Act (CWA or Act), there has been sharp disagreement about the permissible scope of federal jurisdiction over wetlands and other nonnavigable waters. The federal courts are in open disagreement, having split into two basic camps: One applying the so-called "any hydrological connection" test, approves application of the Act to any mudflat, stream, or pond that might, through a series of other waters, share an attenuated connection with a traditional navigable water. *See United States v. Rapanos*, 339 F.3d at 452. Other courts limit the Act to navigable waters and nonnavigable waters that are immediately adjacent to and inseparably bound up with navigable waters. *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (designating *Rapanos* as "unsustainable under *SWANCC*").

This dispute results in inconsistent applications of the CWA, depending only on the circuit court in which one's case is heard. Worse, property owners in circuits that have not yet picked sides in this dispute are trapped in the untenable position

of submitting to illegal government action or risking heavy fines and prison time to discover which rule will be adopted. Further, the widespread confusion, inconsistency, and over-broad application of the CWA creates serious problems for industries that must operate in multiple circuits and damages other vital industries such as agriculture. Finally, the circuits adopting the "any hydrologic connection" test permit profound federal intrusion into the quintessentially local function of land use planning.

Despite repeated attempts, the Congress, the Administration, and the Executive Agencies charged with implementing the statute have failed to create a uniform rule. This Court remains the only institution capable of resolving the conflict and putting an end to the disorder commonplace in this area for the past four years. This Court should grant the petition for certiorari to resolve the conflict among the federal courts and to provide national coherence and uniformity in the operation of the Clean Water Act.

REASONS FOR GRANTING THE PETITION

I

THE CIRCUIT COURTS OF APPEALS ARE SPLIT SHARPLY OVER THE MEANING OF THIS COURT'S DECISION IN *SWANCC*

In 2001, this Court issued its decision in *SWANCC*, outlining the limits of the application of the CWA. And while all courts agree that *SWANCC* articulated *some* limits to the reach of the CWA, the federal courts of appeals disagree sharply over just what those limits are. In the Fifth Circuit, for example, a discharge of a pollutant into a nonnavigable water is subject to regulation only if the pollutant reaches a water that is both immediately adjacent to and inseparably bound up with a navigable water. *See In re Needham*, 354 F.3d at 345.

The Fourth Circuit, however, finds a violation of the CWA if there is any discharge into a water, without a permit, that is hydrologically connected to a truly navigable water; that is, a person is guilty of a CWA violation for filling a wetland adjacent to a ditch that takes a "winding, thirty-two-mile path" through several nonnavigable, man-made watercourses even though the fill material never leaves the original site. *Deaton v. United States*, 332 F.3d at 702. The Ninth Circuit has addressed the issue, but its rule is unclear and presently the subject of three appeals. *See Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers* (9th Cir. Docket No. 03-16586); *San Francisco Baykeeper v. Cargill Salt Division* (9th Cir. Docket No. 05-15051); *City of Healdsburg v. Northern California River Watch* (9th Cir. Docket No. 04-15442). In the decision below, the Sixth Circuit staked out the broadest position on CWA jurisdiction thus far: a person who discharges into a hydrologically isolated wetland is subject to the severe civil and criminal penalties of the Clean Water Act if that wetland, though isolated, is in the general vicinity of another water that shares an eventual hydrologic connection to a navigable water. *See Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004). Only this Court can resolve the conflict and confusion over the scope of the CWA. The circuits openly acknowledge, but show no sign of resolving, their sharp disagreement. The Fifth Circuit derided the decisions in the Fourth and Sixth Circuits as "unsustainable under *SWANCC*." *Needham*, 354 F.3d at 345. The court below in this case also expressly recognized the conflict, explaining the differences between the "minority of courts," which apply *SWANCC* broadly, and the "majority of courts," which limit *SWANCC* to its facts. *See Carabell*, 391 F.3d at 709.

Lower courts in other regions must choose from among these conflicting opinions. Property owners and other potential defendants have no way to assess the legality of their conduct,

and practicing attorneys are unable to give trustworthy advice to their clients. *See* Philip J. Weiser, *Justice White and Judicial Review*, 74 U. Colo. L. Rev. 1305, 1311 (2003) (explaining that Circuit conflicts and unclear law "confuse[] lower courts and practicing attorneys"). The bottom line is that the same federal law means dramatically different things depending on where one's property is located. Filling wetlands without a permit 20 miles from a navigable water is perfectly legal in Mississippi but results in jail time in Michigan; conduct that is free from federal regulation in New York requires a permit in North Carolina. But at least citizens residing in the twelve states making up the Fourth, Fifth, and Sixth Circuits can be reasonably sure what the rule is; whereas the 56 million residents in the nine states and two territories of the Ninth Circuit know only that their conduct *might* land them in jail. *See Creating Additional Federal Court Judgeships*, 150 Cong. Rec. H8048, H8055, 2004 WL 2237300 (Statement of Rep. Simpson) (Oct. 5, 2004).

Litigants, regulators, and property owners in the eight other federal circuits simply have no practical means of telling which test will be applied to them. Risking jail time and serious civil penalties is the only way to determine whether the CWA will apply to one's conduct. A property owner in Northwest Alabama can look a few miles West to Mississippi and the Fifth Circuit's narrow rule or a few miles North to Tennessee and the Sixth Circuit's broad rule, but one must wait for a case to make its way to the Eleventh Circuit, rely on bureaucratic assurances, or proceed without a permit, risking considerable fines and prison.

A recent GAO report confirms the confusion, explaining that the Army Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District*

Office Practices in Determining Jurisdiction 3 (Feb. 2004), *available at* www.gao.gov/new.items/d04297.pdf (last visited May 2, 2005) (hereinafter *GAO Report*). Worse than the inter-district disagreements are the *intra*district inconsistencies: the GAO report concludes that even Army Corps staff working in the same office cannot agree on the scope of the CWA, explaining that "three different district staff" would likely make "three different assessments" as to whether a particular water feature was subject to the Clean Water Act. *GAO Report* at 22. Observers have concluded that there is "confusion" and "no guidance," such that "[n]o one knows what is protected and what isn't." Cindy Skrzycki, *Definition of 'Ditch' Is Muddy at Best*, The Washington Post, Mar. 29, 2005, at E1, *available at* 2005 WLNR 4921280. Or as one expert put it," '[t]here is just pandemonium out there.' " *Id.* (quoting Julie Sibbing, senior program manager for wetlands policy for the National Wildlife Federation). The property owners and others subject to the CWA, are left to the whim of whatever government agent reviews their project.

Even the Executive Branch recognizes that it is applying the CWA inconsistently, but has nevertheless failed to resolve the problem. The Army Corps and the Environmental Protection Agency issued an "Advance Notice of Proposed Rulemaking" to clarify the scope of federal jurisdiction under the Act and asked for public comment on the meaning of the *SWANCC* decision. 68 Fed. Reg. 1991 (Jan. 15, 2003). But when a copy of the draft language for the future regulation was "leaked" in November, 2003, *see* Bob Marshall, *USFWS Contradicts Administration's Plans*, New Orleans Times-Picayune, Dec. 7, 2003, at 16, *available at* 2003 WLNR 2076955, the administration withdrew the proposed rulemaking altogether. *See White House Backs Off on Wetlands Issue*, Wall St. J., Dec. 17, 2003, at B6, *available at* 2003 WLNR 3116291 ("Bowing to criticism from Congress and the public, the Bush

administration is backing away from a proposal that would have weakened federal jurisdiction over some U.S. wetlands.").

Congress held hearings on the impact of the *SWANCC* decision but has never reached any conclusion or solution. *See, e.g.*, Statement of M. Reed Hopper, *supra*. Some Members of Congress introduced several bills attempting to resolve the post-*SWANCC* conflict over the scope of the Clean Water Act but none of these has made it out of Committee. *See* Clean Water Authority Restoration Act of 2005 S.912, 109th Cong. (1st Sess. 2005) (referred to Committee); Clean Water Authority Restoration Act of 2003 S.473, 108th Cong. (1st Sess. 2004) (referred to Committee); Federal Wetlands Jurisdiction Act of 2004, H.R. 4843, 108th Cong. (2d Sess. 2004) (referred to Committee). The members introducing these bills consistently explain that "confusion over the interpretation of the *SWANCC* decision has grown," caused in part by the "wide variety of interpretations by EPA and Corps officials." Statements on Introduced Bills and Joint Resolutions, 151 Cong. Rec. S4400 (Apr. 27, 2005) (Statement of Sen. Feingold).

Congress has failed, the Administration has failed, and the agencies charged with administering this statute have failed to clarify CWA jurisdiction. The lower federal courts cannot agree, thus leaving this Court as the only body capable of settling the conflict and ending the confusion. *See* Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. St. B.J. 346, 349 (1982) (explaining that the "principal task of the [Supreme] Court is to provide some degree of coherence and uniformity in federal law throughout the land").

II

THIS CASE PRESENTS A NATIONAL QUESTION OF VITAL IMPORTANCE

A. The Uncertainty and Overly Broad Application of the CWA Harms Industry, Agriculture, Local Government, and Ordinary People

1. Inconsistent Application of the Clean Water Act Poses Substantial Problems for Companies and Industries Operating Nationwide

National industries like home building and oil production suffer from increased regulatory costs and uncertainty in that they are forced to conform to different readings of the same federal law for each operation, depending on where it is located. The oil industry, for example, produces over 7 million barrels of oil per day from over 500,000 wells nationwide, with the largest concentration of wells in Alaska, California, Texas, Louisiana, Oklahoma, and Wyoming. *See* U.S. Department of Energy, *United States Country Analysis Brief, available at* http://www.eia.doe.gov/emeu/cabs/usa.html#oil (last visited May 3, 2005). A company operating in each of these jurisdictions has to apply the divergent rules for the Ninth and Fifth Circuits, while somehow divining what the rule might be in the Tenth Circuit.

Nationwide home builders are also forced into the difficult position of complying with varying interpretations of the CWA as they operate from circuit to circuit. Forcing home builders to protect themselves by applying for permits that they may not need drives up costs, decreases production, and delays construction. Not surprisingly, consumers and home buyers are the ultimate victims of this patchwork scheme. A recent study indicates that it costs an *average* of more than $271,000 to

prepare an individual fill permit, while a nationwide permit application costs nearly $30,000 to prepare. *See* David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetland Conservation: A Post*-SWANCC *Exploration of Conservation Alternatives* at 7 (Jan. 2003), *at* http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF (hereinafter *The Sunding Permitting Study*). These costs cover only labor costs and fees; they ignore the more significant and inevitable costs associated with project delay and reduction. *See id.* The study also reveals that it takes an average of 788 days—two years and two months—to get an individual 404(a) permit. *Id.* at 8. These alarming delays and extraordinary costs not only exclude all but the largest developers from the market, but also impose millions in costs on builders and individual home buyers. *See* Alvin C. Harrell, *Banking and Finance 1997: An Overview of Chartering and Regulatory Developments*, 51 Consumer Fin. L.Q. Rep. 198, 230 n.8 (1997) (explaining that "historic trends in business concentration suggest that this is a normal pattern: Increased federal regulation and enhanced regulatory enforcement mechanisms seem inevitably to drive smaller firms out of business and lead to increased concentration in the industry").

2. Inconsistency and Overly Broad Application of the Clean Water Act Costs the Economy Billions and Negatively Impacts Consumers and Home Buyers

The following simple and realistic example illustrates the costs of wetland permitting. *See* David L. Sunding, *Wetlands Protection Beyond Section 404: Economic Aspects*, SH088 A.L.I.-A.B.A. 165 (2003). Consider a 1,000-unit housing project to be built on 200 acres, 40 of which are jurisdictional wetlands, and assume that the pre-regulation marginal cost of homes in the project is a constant $200,000. *See id.* at 167. Suppose also that the pre-regulation price of the homes in the project is $250,000 and that the elasticity of demand is -1.67.

See id. Suppose that the wetlands regulation results in an out-of-pocket cost to the developer of $2,000 per home (or $2 million in total, including mitigation), reduces the project size by 100 units by placing 20 acres off-limits to development, and delays completion of the project by 2 years. *See id.* Homes in the project are now more expensive to construct and, worse, there are fewer of them, so their market price will increase. *See id.* at 168. Based on the assumptions above, the price of a home in the project will increase from $250,000 to $265,000. *See id.* But the harm from the overregulation is no simple $15,000. Consumers are harmed in that some cannot purchase homes at all due to the reduction in the size of the project, some may purchase homes but must pay a higher price, and the entire project is delayed by regulation. *See id.* The impact of this situation on developers and landowners is more complex: producers might "gain" from the increase in home prices, but they lose from the increase in costs and from the delay in completing the project and receiving their return on investment. *See id.* The total economic losses from wetland permitting is thus in the millions per year.

As this example illustrates, consumers bear the brunt of losses from wetland permitting. They are unambiguously harmed by increases in price and reductions in the number of homes available for purchase. Developers and landowners fare better because they can pass on some costs to consumers, but there can be no doubt that they suffer as well. Worse, traditional measures of the cost of regulation—namely the out-of-pocket cost of obtaining a permit and performing mitigation—are far off the mark, dramatically understating the true impacts. These hidden costs of regulation, including the costs of project delay, can be worse than the costs that show up on the balance sheet.

These burdensome costs are particularly important given the $760 billion that construction and development activity contribute to the economy on an annual basis. *See* David

Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 81 (2002). The sale price of property with federally regulated wetlands is devalued by over 10% due solely to the burdens of dealing with the federal regulatory process. *See* Randall S. Guttery, et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 Am. Bus. L.J. 299, 329 (2000). Significantly, this devaluation of land is also present when a property is even *likely* to be delineated as a federally protected wetland. *See id.* at 316.

3. Overly Broad Application of the Clean Water Act Harms Farmers, Ranchers, and Small Property Owners

As Congress has recognized, "efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation." 7 U.S.C. § 2301. Or as Senate Joint Resolution 163 declaring "National Agriculture Day" put it, "agriculture is the Nation's largest and most basic industry," provides "more jobs than any other single industry," and "is vital to maintaining the strength of our national economy." Pub. L. No. 103-223, 108 Stat. 103 (1994).

The interpretation of the CWA adopted below wreaks havoc on farmers and ranchers. There is little difference between the "unnamed ditch" the court below designated a "water of the United States," *Carabell*, 391 F.3d at 705, and the furrows and ditches common on farms and ranches across this nation. *See Webster's New International Dictionary* (William A. Nelson ed., 2d ed. 2000) (defining "furrow"). Indeed, nonnavigable, man-made drainage ditches and drains make up part of the hydrologic connection which the Sixth Circuit used to justify Amicus John Rapanos's criminal

conviction and civil liability. *See United States v. Rapanos*, 376 F.3d 629, 643 (6th Cir. 2004).

Under the interpretation presently adopted by the Fourth, Sixth, and Ninth Circuits, nearly every farm and ranch is operating in violation of the CWA and requires a costly permit. This is no mere theoretical problem. The Army Corps requires permits for certain agricultural plowing and for so-called "sidecasting," a process which involves placing excavated materials from a ditch along the side of the ditch. *See*, respectively, *Borden Ranch Partnerships v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam), and *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). The Army Corps even claims jurisdiction over "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland." Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). According to the government, then, some farmers and ranchers may not even walk across parts of their land and ditching without a permit from the Army Corps, risking fines and prison time if they do so.

The Corps has a track record of taking the hardest possible line against property owners. Elderly Florida resident Ocie Mills and his son were "sent to prison for depositing sand on his privately-owned wetlands that the public had decided it wanted but was unwilling to purchase." Roger Marzulla, et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin. L.J. Am. U. 253, 260 (1995). They each received 21 months in jail, one year of supervised release, and were fined. *See Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). John Pozsgai was sentenced to three years imprisonment, five years probation, and fined $200,000 for placing clean fill in wetlands in Eastern Pennsylvania. *See United States v. Pozsgai*, 757 F. Supp. 21, 22 (E.D. Pa. 1991). Members of Congress described the Corps' behavior toward Mr. Pozsgai as "dictatorial" and

"Gestapo-like." Bud Shuster & Jimmy Hayes, *Big Lie on Clean Water*, Wash. Post, May 16, 1995, at A17. There are others. *See, e.g., United States v. Wilson*, 133 F 3d 251, 254 (4th Cir. 1997) (noting that James Wilson was sentenced to 21 months in prison and $1 million in fines for filling wetlands that drained to ditches, intermittent streams, and creeks).

Amicus John Rapanos is still defending himself against the government's unwarranted CWA charges in a criminal suit filed in 1993 and the government's civil suit filed in 1994. This has resulted in dozens of appeals and at least one successful petition for certiorari. *See Rapanos v. United States*, 533 U.S. 913, granting, vacating, and remanding case for reconsideration in light of *SWANCC*. At trial, Mr. Rapanos was "likened to the devil and [had] his treeless property compared to the Warsaw ghetto without Jews" while the evidence of his "guilt was far from overwhelming." *United States v. Rapanos*, 115 F.3d 367, 378 (6th Cir. 1997) (Nelson, J., dissenting). In the opinion of the trial judge in his criminal case, the government has obstinately pursued Mr. Rapanos because he is "easy to dislike" and had "the temerity to insist upon his constitutional rights." *See* Sentencing Hearing, *United States v. Rapanos*, No. 93-20023 (Mar. 15, 2005) at 8.[2] Judge Zatkoff declared that Mr. Rapanos is "exactly the person who should be protected by the Constitution," *id.* at 9. But the government presses on, even claiming that Rapanos's small discharge of sand 20 miles distant from the nearest navigable water was worse than the *Exxon-Valdez* spill, which dumped 11 million gallons of oil into Prince William Sound. *Id.* at 11.

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[2] A true and correct copy of this document is attached hereto and Amici respectfully requests that this Court take judicial notice of the comments therein.

These stories are chilling but all too common. Equally significant, the very real threat of imprisonment deters landowners from making full use of their property and coerces them to accept federal intrusions. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envtl. L.J. 43, 64 (1993) (describing the well-known deterrent effect of jail time for environmental "crimes" on otherwise law-abiding citizens). Few individuals are willing to risk bankruptcy and prison while spending millions of dollars on legal fees and being demonized by federal prosecutors. Property owners, having observed the fate of defendants like John Rapanos, Ocie Mills, and John Pozsgai, make the rational but rueful choice to submit to illegal demands from administrative agencies.

B. The Uncertainty and Overly Broad Application of the Clean Water Act Harms Local Governments and Invades Traditional Local Power over Land Use Planning

Home buyers, energy producers, and agricultural interests are not alone in suffering harm from the oppressive yoke of the CWA. Local governments, are also subject to the CWA's severe penalties. *See Clean Water Act Penalty Appeals*, *available at* http://www.epa.gov/eab/eabcwp.htm (last visited May 3, 2005) (showing local government as frequent defendants in CWA enforcement actions). The further the CWA is extended, regulatory burdens, costs, and delays will be added to important public works projects. EPA's heavy handed activities have "created problems of federal/state/local relationships because state and local governments have not always taken kindly to federal directions." Frank P. Grad, *Opening Note*, 25 Colum. J. Envtl. L. 213, 216 (2000).

This kind of federal control over local land use decisions marks a serious intrusion into a traditional area of state concern. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . . ."); J. Blanding Holman, IV, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 140 (1995) (noting that the CWA involves "land use regulation, an area traditionally of local concern"). Indeed, land use is widely recognized as "perhaps the quintessential local responsibility." Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 Wm. & Mary L. Rev. 1191, 1205 (2001).

State and local planners must balance a wide variety of objectives when evaluating land use decisions in order to fulfill their general goal of "enhanc[ing] the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping, and recreational activities." Fla. Stat. Ann. § 187.201(15)(b)(3) (West 2005). The state must account for myriad "social, political and legal obstacles confronting the intent of private landowners, state governments, and federal regulatory agencies" in the land-use process. Eric M. Bryn, *Through a BioDiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management Plan*, 1 Great Plains Nat. Resources J. 65, 81 (1996). Amicus John Rapanos's State of Michigan has identified more than twenty objectives for land use planning. *See Michigan's Land, Michigan's Future, at* http://www.michiganlanduse.org/finalbysection.htm (last visited May 3, 2003). Through local control, communities may develop "broad goals at the state level," which "shaped locally, can result in a workable legal regime" balancing societal needs with sustainable development.

David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2366 n.457 (2003).

Displacing state authority with a burdensome federal regulatory scheme under the Clean Water Act distorts this process. It removes the state's ability to balance these complex goals and replaces it with a powerful, single-minded federal statute, backed up by the force of severe penalties. Amicus John Rapanos is facing 10-16 months *in a federal penitentiary* for filling wetlands on his private property with sand, a practice which was, for many years, encouraged as good public policy. *See* James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1, 37 (2002). Further, Mr. Rapanos was tried solely for depositing sand in the wetlands without a federal permit, not from any resulting environmental damage or impairment of navigable waters. *See United States v. Rapanos*, 190 F. Supp. 2d at 1012. Indeed, Mr. Rapanos's wetlands are some 20 miles from the nearest navigable waterway and the only basis for federal jurisdiction is a remote surface hydrologic connection. *See id.* at 1014. But the wetlands on the *Carabell* property are not even hydrologically connected to navigable waters; they are merely in the general vicinity of a ditch that is connected to a distant navigable water by a series of intermittent ditches, culverts, and streams, the majority of which are man-made. *Carabell*, 391 F.3d at 708-09 (describing the connection between a nearby ditch and, eventually, a navigable water, but finding no connection between the Carabells' wetland and the ditch). This is untenable in a federal system in which the state governments are meant to be equal. *See, e.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 350-51 (1819).

The intensity of the interference with traditional local powers is matched only by its breadth. Interpreting the phrase "waters of the United States" in the Clean Water Act to include any water in the general area of a ditch with an eventual hydrologic connection to a navigable water greatly expands

federal jurisdiction and displaces state authority in one of its primary areas of responsibility. While it is unclear just how many millions of acres of wetlands exist in the United States, the number is enormous. By some estimates, there are as many as three hundred million acres of wetlands over which the Corps exercises jurisdiction. *See* Christopher J. Schulte, *Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?,"* 15 Hamline L. Rev. 439, 444 (1992) (explaining that, under the Federal Wetlands Manual operational before *SWANCC*, "the jurisdictional reach of the federal government has been estimated to have increased from the previous 105 million acres to between 200 and 300 million acres"). In Minnesota, *20%* of the state is made up of wetlands. *The Sunding Permitting Study* at 11. Alaska has an estimated 170 million acres of wetlands while Florida, Louisiana, Texas, North Carolina, Michigan, Wisconsin, and Maine contain over 5 million acres of wetlands each. *See* Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 Va. Envtl. L.J. 1, 19 n.99 (2000).

CONCLUSION

This case raises questions of vital importance to all sectors of society: industry, agriculture, environmentalists, property owners, and consumers. The confusion and uncertainty surrounding the permissible reach of the Clean Water Act is bad for everyone, but neither Congress, the Administration, nor the agencies charged with executing this statute can resolve the problem. Because the circuit courts are locked in an irreconcilable conflict, only this Court is capable of putting an end to the disorder. There are currently two petitions for writ of certiorari pending before this Court that address the limits of federal jurisdiction under the Clean Water Act: This case, and *Rapanos v. United States* (Docket No. 04-1034). And while there are several cases raising the same issue in the lower courts, further distillation of the issues will not aid this Court in resolving these conflicts but will only create more problems.

These cases raise an important question of law which only this Court can resolve, and it should resolve it now.

DATED: May, 2005.

Respectfully submitted,

GREGORY T. BRODERICK
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae John A. Rapanos and Pacific Legal Foundation

Attachment - 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN RAPANOS,

Defendant.
_____/

HONORABLE LAWRENCE P. ZATKOFF

No. 93-20023

SENTENCING HEARING
Tuesday, March 15, 2005

- - -

Peregord, Jennifer
U.S. Attorney's Office
211 W. Fort Street, Suite 2300
Detroit, Michigan 48226
(313) 226-9100
Attorney for Plaintiff

Thomas Wilhelm
2636 Dixie Highway
Waterford, MI 48328
(248)618-7280
Attorney for Defendant

- - -

LAWRENCE R. PRZYBYSZ, RMR, MA
Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 731
Detroit, Michigan 48226
(313) 414-4460

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

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Attachment - 3

Detroit, Michigan
Tuesday, March 15, 2005
2:00 p.m.

- - -

THE COURT CLERK: Calling case number 93-20023, United States versus John Rapanos.

THE COURT: Somebody want to put their appearances on the record?

MS. PEREGORD: Jennifer Pereford on behalf of the United States.

MR. WILHELM: Thomas Wilhelm appearing on behalf of and with Mr. Rapanos.

THE COURT: Who else do we have at counsel table? It looks like we have all of the big guns here.

MR. BERG: Terrance Berg, your Honor, on behalf of the United States.

MS. PARKER: Janet Parker also on behalf of the United States, your Honor.

THE COURT: Okay. How do you wish to proceed in this matter?

MS. PEREGORD: Well, I guess I'm willing to go first, your Honor. I just have a couple brief remarks to make.

I am assuming that the Court received our post-Booker Resentencing Memorandum last Friday. We also faxed a copy of that to defense counsel and he has confirmed that he has received that.

THE COURT: I received it and reviewed it.

MS. PEREGORD: Okay. As the Court is aware, and I am just going to be briefly recapping what we said in our three

resentencing pleadings that we have filed since remand, it's the government's position that the defendant must be sentenced to a sentence within the ten to sixteen month range.

The Court of Appeals has twice affirmed the propriety of a sentence within that range. And the only two enhancements that were applied to the base offense level in this case were the lack of a permit, and as the Court knows, that was subsumed within the jury's verdict in this case, and also the fact that the wetlands filling was ongoing, an ongoing and repetitive discharge and the defendant has admitted to having done that.

THE COURT: Where did he admit that?

MS. PEREGORD: At the defendant's sentencing, initial sentencing in 1998, this is at page five of my Resentencing Memorandum which was the first pleading we filed on August 13th, at the initial sentencing of 1998 your Honor ordered a fine $185,000 stating, I'm basing that on $5,000 a day based on what was originally agreed on, agreed upon and represented to the Court by the defense that there were 37 days of filling of the actual wetlands. And that is at the sentencing transcript of December 2, 1998 at page 30.

THE COURT: Okay.

MS. PEREGORD: So based on the fact that there are no guidelines factors in this case that were not either found by the jury beyond a reasonable doubt or admitted by the defendant, we submit that even under the advisory system which is in place now post-Booker that a ten to sixteen month sentence would definitely be the reasonable sentence to impose in this case.

Thank you, your Honor.

THE COURT: Okay. Mr. Wilhelm?

MR. WILHELM: Your Honor, I disagree that the sentence of ten to sixteen months would be reasonable in this

matter. I do not believe that the Court at this time post-Booker is bound by—to follow the remand order of the Sixth Circuit Court of Appeals.

And I say that because at that point in time when they did issue the mandate or remand to this court, the guidelines were at that point thought to be mandatory and even that Court thought that they had to follow the guidelines.

Now the guidelines are only advisory, as Ms. Peregord pointed out, and they are no longer bound by the guidelines but must consider the guidelines with other special factors which I believe the Court, number one, is well aware of, and, number two, has already at some point in time considered them.

The prosecutor, in her memorandum, most recent memorandum, says that a sentence within the guideline range is not unreasonable. It is unreasonable and I believe that is what the Supreme Court, the conclusion of Supreme Court also came to when it decided Booker. It's unreasonable because it does not consider the other factors that the Court should consider in its sentencing the defendant. And those factors amount to the history and characteristics of the defendant himself.

And I believe, your Honor, that this is the time to put this case behind the Court, behind Mr. Rapanos, and sentence him to, actually, to time served or, and/or some other sentence that recognizes those characteristics of Mr. Rapanos.

Does the Court wish me to continue talking about the sentence that the Court should impose or what I believe the Court should impose?

THE COURT: Not really. I will give you an opportunity to address the Court later.

MR. WILHELM: Thank you, your Honor.

THE COURT: Mr. Rapanos, you have a right to speak in your own behalf. Is there anything you want to say?

THE DEFENDANT: Your Honor, I don't believe there were any wetlands on that property back then or even today. And in the courtroom today is Mr. Russ Harding who is the DEQ Director for the State of Michigan for over eight years and I wish you would hear from him, your Honor.

THE COURT: Mr. Wilhelm, what is that all about?

MR. WILHELM: Well, Mr. Harding has done a study, another study of the wetlands or purported wetlands on Mr. Rapanos's property and he has concluded based upon his expertise that there were no wetlands on that property.

THE COURT: We are not going to retry the facts.

WILHELM: That's what I thought. I understand that, your Honor.

THE COURT: Let me just make a statement and tell you where the Court is coming from in this case and I will give both parties an opportunity to again address the Court.

This is the oldest case in my chambers. It's the most voluminous, and we are anxious to close this case.

This case is referred to within my chambers by everybody as the "Sand Man Case" Everybody that talks about the sandman knows that we are talking about Mr. Rapanos because what he did was to move sand from one end of his property to the other end of his property. This all occurred on property he owned. Nothing was brought in to fill this land except sand that was already on that land.

Counsel for the government has pointed out in both her memo and just now in court that this Court has been reversed twice on this sentence, and that is true. And it seems to imply that I am a very light or lenient person in sentencing in criminal matters.

Well, rumor has it when I first got on this bench after the first two years that I held the record for high sentences in the Eastern District of Michigan, and that was probably true. And last week I just refused to accept a Plea Bargain Agreement entered into between the government and a defendant because, in my opinion, the sentence was too lenient. So I'm not sure the US Attorney's Office can make that case.

In this case, I granted a motion for a new trial. I have been a Judge for 27 years. And I granted a motion for a new trial approximately five times. And I can't remember ever granting one in a criminal case. So this case was very, very rare to me.

Based on the totality of all of the circumstances I did not believe that a fair trial was had in this case. I could have granted a mistrial several times during the case but I was loathe to do that as any trial Judge is because of all of the money and the preparation that goes into something like this, you want to wait and see how the case turns out and if it turns out that this was harmless error then there is no need to retry the case.

In this case, out of one out of five or maybe even less, I did believe that a mistrial and a new trial should be granted in this case. And, of course, that went up to the Court of Appeals and I was reversed again.

So you have to ask the question, what is going on in this case? Why is the government insisting that this particular defendant go to prison? I'm not really sure but I will give you my opinion on it.

First of all, my relationship with the US Attorney's Office in the Eastern District of Michigan has been excellent. You could consider me to be a cheerleader for the US Attorney's Office in the Eastern District of Michigan. I was the Chief Judge for five and a half years and I was the contact point

between the US Attorney's Office and this bench. And I've also enjoyed a very good relationship.

Being a member of the Judicial Conference of the United States and attending Chief Judges meetings around the United States I always spoken very highly of the US Attorney's Office in the Eastern District of Michigan.

As a matter of fact, as the Chief Judge, I instituted a program of publicly swearing in new assistant United States Attorneys so as to make that experience a big deal for them and their families which I believe it is. And I am hoping that the new Chief Judge will continue to do that.

As a general rule I found this Office to be reasonable, responsible, open and cooperative. There are exceptions to every rule and I am finding that this case is an exception.

So, what is going on in this case? And this is just my opinion. I'm asking myself and people are asking me, why is the government so determined to send this defendant to prison for moving his sand?

Number one—I think it's a two-prong thing—number one, this defendant is a very disagreeable person. He is rude. He is arrogant. He is obscene on occasion. He wants everything his way. He has been successful in his life and he wants everybody to know it. So he is a man who is easy to dislike.

Number two, this person who is easy to dislike had the audacity and the temerity to insist upon his constitutional rights. This all started for this individual, this legal business all started on or about August 30th, 1989, when the defendant insisted upon a search warrant before he would let anybody on his property. Prior to that date, he had been meeting with the DNR on several occasions and they were trying to work out an inspection of the property. My understanding is on that date, on August 30th, there was a meeting at his property and he had his

attorney present. And there was a confrontation between he and the DNR people. The DNR people had one view of what they wanted to do. He had another view of what he wanted to do. He turned to his lawyer and asked whether or not he had to permit the DNR to go on his property. And the lawyer said you don't have to permit them unless they have a search warrant and then he said, I'm not going to permit you unless you have a search warrant. That's when all of this started. Turned it over to the federal government, the state government.

Incidentally, the state government had prior trespasses on the defendant's property once and at least twice.

So here we have, and this is my view of what is going on, we have a very disagreeable person who insists on his constitutional rights. And this is the kind of person that the Constitution was passed to protect. He is exactly the person who should be protected by the Constitution.

People ask, well, what did this person dump to pollute the waters of the United States? Did he dump oil, radioactive substances, sewage, garbage, herbicides, pesticides, insecticides, fungicides, fertilizer, detergent, lead, iron, copper, mercury, benzene, dioxin, PCB's, PCP's, bacteria, DDT, chlordane, nitrates or cyanide? No. He didn't dump that. He polluted the waters of the United States by moving sand from one area of his property to the other.

So then they ask, well, did he dump it into the Great Lakes? No. Did he dump it into any lake? No. Did he dump it into a river? No. Did he dump it into a stream? No. Did he dump it into a pond? No. Did he dump it into waters adjacent to any of the inhabitable waters of the United States? And the answer to that is, no.

I am finding that the average US citizen is incredulous that it can be a crime for which the government demands prison for a person to move dirt or sand from one end of their property

to the other end of their property and not impact the public in any way whatsoever.

I read the government's recent Memo under date of 3-11-05. The memo, when it states that the elements of the enhancement were proved beyond a reasonable doubt to the jury or were admitted by the defendant, I do not find to be true. I don't find that to be credible. I know we have a difference of opinion on that benefit of the record in front of me. I might be wrong, but I don't think I am.

The memo speaks to increased uniformity. I agree with that. It talks about unwarranted disparities. And I agree with that. It talks about the seriousness of the offense and just punishment for that offense.

The government does not talk about the substance that was dumped, that is, sand versus toxic waste, doesn't talk about harm to the public, doesn't talk about disruption of public utilities, doesn't talk about evacuation a community, or doesn't talk about public money for clean up.

And, in my opinion, the government has failed to address similar conduct in sentencing consequences.

We have done some research about what happens to people who are accused and convicted of environmental crimes.

In Michigan, environmental defendants have rarely been sentenced to prison for their environmental crimes. Aldo Quadrini and Gaspere Vitale were sentenced to one year probation and ordered to pay $5,000 in fines and to fully restore wetlands. The two Macomb County developers were prosecuted by the Michigan Department of Environmental Quality after they clear-cut, plowed and destroyed eight acres of forested wetlands in New Baltimore, Michigan. The violations occurred between 1995 and 1999. And despite repeated warnings the defendants continued cutting and chipping trees,

removing stumps and bulldozing the site. So they received one year probation and a $5,000 fine.

In another interesting case involving corporate environmental pollution, the Department of Justice prosecuted BP Oil Company for discharging pollutants into the Delaware River in violation of the Clean Water Act. Over a six year period, BP discharged a variety of pollutants, including oil and grease. These pollutants depleted the oxygen supply in the water, making it impossible for fish to survive and reproduce. In addition, hydrocarbons present in the pollution have the potential to become concentrated in the fish. BP's violations represented a major contribution to the pollution of the river. In addition, they were committed knowingly over a period of years. Nonetheless, the Department of Justice only prosecuted BP Oil civilly. There were no criminal charges brought against them at all. Ultimately, BP Oil was fined and merely told to clean up their facility.

Perhaps the most notorious American environmental disaster of 20th Century was the Exxon Valdez oil spill of 1989 which is the same year that the defendant moved his sand. When the Exxon Valdez struck Bligh Reef in Alaska's Prince William Sound, it dumped 10.8 million gallons of crude oil in the water and created a huge oil slick killing tens of thousand of animals. That oil slick reached 1,300 miles of coastland and killed approximately 250,000 birds, 2,800 sea otters, 300 seals, and 250 bald eagles. In addition, the disaster crippled the local fishing industry.

Joseph Hazelwood was the captain of the Exxon Valdez. It was later determined that Captain Hazelwood was drunk on the night of the spill and that his negligence caused the accident. Captain Hazelwood was prosecuted and convicted of negligence in this matter. He was sentenced to serve 1,000 hours of community service over five years with no prison time or no fine.

So, do either counsel -- in addition to that, I have prepared a written Opinion that covers much of what I have stated. But I will give an opportunity at this time for either counsel to address the Court if they wish.

MS. PEREGORD: Just very briefly, your Honor. It is the government's position that the likeability or lack thereof of the defendant had absolutely nothing to do with this prosecution. Moreover, sand is more toxic and destructive to wetlands than any of the substances the Court mentioned.

THE COURT: Even the 10.8 million gallons of crude oil dumped in the waters off Alaska?

MS. PEREGORD: That is because sand totally destroys wetlands, and once wetlands are destroyed their ability to filter pollutants from reaching the water and their ability to prevent and control flooding is totally obliterated. Mr. Rapanos—

THE COURT: So let me just ask you this question.

MS. PEREGORD: Sure.

THE COURT: Where are my notes? Would it be better for him to have filled these lands with copper or lead or mercury or benzine?

MS. PEREGORD: Frankly, if the wetlands had been in existence they would have had a pretty high ability, especially at the rate of approximately 60 acres that he had on his property, to filter such toxic substances from ever reaching the water. The lack of the wetlands totally prevents such a thing.

THE COURT: I appreciate your comments. Go ahead.

MS. PEREGORD: Thank you. Mr. Rapanos was prosecuted because he refused repeatedly to apply for a permit. That is all he was asked to do. He was told by employees from

the MDNR that it was likely that he could still build the commercial shopping project that he intended to build if he would submit a permit and work around some likely fairly minor restrictions with regard to driveways and access to the property and where the commercial structure was located.

He initially agreed to apply for a permit and then after his consultant came back with a figure of 50 to 60 acres, he threatened to ruin and otherwise destroy his consultant if he did not get rid of every one of his records showing he had done work on the Salzburg Road property.

Mr. Rapanos lied to the EPA in writing when he said that no agency had ever found that there were wetlands on that property when he well knew that at that point the DNR had been out there, they had executed the search warrant, they had found a minimum of 29 acres and they had continued to attempt to get his compliance with ceasing to fill the wetlands and simply applying for a permit.

He was prosecuted because he refused to obey the law, your Honor. Plain and simple. Thank you.

THE COURT: Does the defense wish to place anything on the record?

MR. WILHELM: Your Honor, I will be very brief. The Court is aware at the initial sentencing in 1998, the Court sentenced Mr. Rapanos to a three year period of probation, fined him $185,000 and required that he do 200 hours of community service work.

Mr. Rapanos successfully completed his probationary sentence, and completed his—paid his fine and did his community service work a number of years ago. That all became resolved.

We would ask the Court to take in the factors the Court can consider now. We ask the Court to sentence him to time

served. And I think that would be a just resolution of this matter, your Honor.

THE COURT: Okay. As I indicated earlier, we have prepared a written Opinion. I have not signed it yet because I wanted to hear what counsel had to say. There may be a few minor adjustments. I anticipate that we will have that written Opinion and Order within a half hour or so.

But the sentence of this Court is going to be that the defendant be placed on probation for a period of three years. He is to perform 200 hours of community service, a fine of $185,000, special assessment of $100, all of which I understand has been satisfied. As far as I am concerned, this case is closed.

If counsel wish to wait around for the Opinion, as I indicated, it will be ready probably in thirty minutes.

Is there anything further either counsel wish to place on the record in this matter?

MS. PEREGORD: No, your Honor.

MR. WILHELM: No, your Honor.

THE COURT: Thank you.

- - -

Attachment - 15

CERTIFICATION

I, Lawrence R. Przybysz, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/Lawrence R. Przybysz
Lawrence R. Przybysz
Official Court Reporter

3-18-05
Date

- - -

Supreme Court, U.S.
FILED
DEC - 2 2005
OFFICE OF THE CLERK

No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

PAUL D. CLEMENT
Counsel of Record
KELLY A. JOHNSON
GREER S. GOLDMAN
TODD S. KIM
Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
(202) 514-2217

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

PETITION FOR WRIT FILED APRIL 11, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

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U.S. District Court
Eastern District of Michigan (Detroit)
CIVIL DOCKET FOR CASE #: 2:01-cv-72797-PDB-WC

Carabell, et al v. U S Army Corps Eng, et al
Assigned to: Judge Paul D Borman
Referred to: Honorable Wallace Capel
Demand: $0

Date Filed: 07/26/2001
Jury Demand: Plaintiff
Nature of Suit: 893 Environmental Matters
Jurisdiction: U.S. Government Defendant

Plaintiff
June Carabell

represented by

Jennifer P. Fitzgibbons
Dickinson Wright
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
313-223-3500
Fax: 313-223-3500
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul R. Bernard
Dickinson Wright
500 Woodward Avenue

Suite 4000
Detroit, MI 48226-3425
313-223-3500
Fax: 313-223-3117
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Peter H. Webster
Dickinson Wright
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
313-223-3500
Email: pwebster@dickinsonwright.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Timothy A. Stoepker
Dickinson Wright
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
313-223-3500
Fax: 313-223-3500
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff
Keith Carabell
represented by

Jennifer P. Fitzgibbons
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul R. Bernard
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Peter H. Webster
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Timothy A. Stoepker
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff
Harvey Gordenker

represented by

Jennifer P. Fitzgibbons
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul R. Bernard
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Peter H. Webster
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Timothy A. Stoepker
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff
Frances Gordenker
represented by

Jennifer P. Fitzgibbons
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul R. Bernard
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Peter H. Webster
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Timothy A. Stoepker
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant
United States Army Corps of Engineers
represented by

Geneva S. Halliday
U.S. Attorney's Office (Detroit)
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Fax: 313-226-9778
Email: geneva.halliday@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Laurel A. Bedig
U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986
202-514-4198
Fax: 202-514-4198
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant
Environmental Protection Agency
represented by

Geneva S. Halliday
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Laurel A. Bedig
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/26/2001	1	COMPLAINT with attachment 1 jury demand - Receipt # 32551 - Date Fee Received: 07/26/01 (dh) (Entered: 07/27/2001)
07/31/2001	2	ORDER reassigning case from Judge George C. Steeh to Judge Paul D. Borman - Reason: disqualification of Judge (RH) (Entered: 08/01/2001)
08/17/2001	3	PROOF of mailing of complaint (ew) (Entered: 08/20/2001)
10/01/2001	4	ANSWER by Environ Protection, U S Army Corps Eng to complaint [1-1] with proof of mailing (ew) (Entered: 10/03/2001)
10/11/2001	5	ORDER by Judge Paul D. Borman, setting deadline for witness list for 2/11/02 , setting deadline for discovery for 3/11/02 , setting deadline for filing dispositive motions for 4/11/02 , setting deadline for mediation referral (if the parties stipulate) for 3/11/02 ; with proof of mailing [EOD Date 10/12/01] (kb) (Entered: 10/12/2001)
11/15/2001	6	PROOF of mailing of summons and complaint (ew) (Entered:

		11/16/2001)
12/28/2001	7	ORDER by Judge Paul D. Borman with stipulation of partial dismissal of count II, count IV, count VI, count VIII and count IX of plaintiff's complaint [EOD Date: 1/2/02] (lh) (Entered: 01/02/2002)
04/01/2002	8	ORDER by Judge Paul D. Borman with stipulation recinding scheduling order and establishing summary judgment briefing schedule: deadline for plaintiff's summary judgment motion for 4/12/02 , deadline for cross motion for 5/28/02 , setting deadline for response to summary judgment motion 6/18/02; defendants' reply due 7/9/02 [EOD Date: 4/2/02] (RH) (Entered: 04/02/2002)
04/11/2002	9	ADMINISTRATIVE record - Volume 1, Documents 1-33 (lh) (Entered: 04/11/2002)
04/11/2002	10	ADMINISTRATIVE record - Volume I, Documents 34-68 (lh) (Entered: 04/11/2002)
04/11/2002	11	ADMINISTRATIVE record - Volume I, Documents 69-90 (lh) (Entered: 04/11/2002)

04/11/2002	12	ADMINISTRATIVE record - Volume 2, Documents 1-24 (lh) (Entered: 04/11/2002)
04/11/2002	13	ADMINISTRATIVE record - Volume 3, Documents 1-21 (lh) (Entered: 04/11/2002)
04/12/2002	14	MOTION by plaintiff for summary judgment with brief, notice of hearing, and proof of mailing. (PP) (Entered: 04/15/2002)
04/16/2002	15	ORDER by Judge Paul D. Borman, referring all pretrial proceedings to Magistrate Judge Wallace Capel Jr. [EOD Date 4/18/02] (ew) (Entered: 04/18/2002)
05/31/2002	16	MOTION by defendants U S Army Corps Eng and Environ Protection for summary judgment with brief and proof of service (lh) (Entered: 06/03/2002)
06/20/2002	17	REPLY by plaintiffs to response to motion for ~~summ~~mary judgment by June Carabell, Keith Carabell, Harvey Gordenker, Frances Gordenker [14-1] with proof of service (kb) (Entered: 06/24/2002)
07/09/2002	18	ORDER by Judge Paul D.

		Borman with stipulation, extend time to 7/25/02 for defendants' reply brief [EOD Date: 7/12/02] (RH) (Entered: 07/12/2002)
07/26/2002	19	REPLY memorandum by Environ Protection, U S Army Corps Eng to response to motion for summary judgment by Environ Protection, U S Army Corps Eng [16-1] with proof of service (dh) (Entered: 07/29/2002)
08/23/2002	20	NOTICE of setting hearing on motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1] and motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] for 10:00 9/19/02 (cm) (Entered: 09/03/2002)
09/19/2002		MOTION hearing held on motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1], motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] - disposition: UNDER ADVISEMENT - Magistrate Judge Wallace Capel Jr. - Court Reporter: cv tapes 02-29,30,31

		(pp) (Entered: 09/19/2002)
09/25/2002	21	TRANSCRIPT taken on 9/19/02 of motion hearing (kb) (Entered: 09/27/2002)
02/28/2003	22	REPORT and recommendation by Magistrate Judge Wallace Capel Jr. that motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1] be granted and motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] be denied [EOD Date: 3/6/03] (RH) (Entered: 03/06/2003)
03/14/2003	23	OBJECTIONS by plaintiff to report & recommendation [22-1] with proof of service (ew) (Entered: 03/17/2003)
03/27/2003	24	ORDER by Judge Paul D. Borman accepting report & recommendation [22-1], granting motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1], denying motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] [EOD Date 4/1/03] (at)

		(Entered: 04/01/2003)
03/27/2003	25	JUDGMENT entered by Judge Paul D. Borman for defendant [EOD Date: 4/1/03] (at) (Entered: 04/01/2003)
04/25/2003	26	PROOF of service of notice of appeal (ew) (Entered: 04/28/2003)
04/25/2003	27	APPEAL by plaintiffs June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker of orders [24-1] and [25-1] to USCA - FEE: PAID - Receipt #: 486768 (lb) (Entered: 05/06/2003)
05/06/2003	28	PROOF of service of notice of appeal [27-1] to USCA and counsel of record (lb) (Entered: 05/06/2003)
10/07/2004	29	(Not Certified) ORDER from USCA re 27 Notice of Appeal - affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 10/07/2004)
12/09/2004	30	SLIP Opinion from USCA as to 27 Notice of Appeal filed by Keith Carabell, June Carabell, Harvey Gordenker and Frances Gordenker - affirmed. [Appeal Case Number 03-1700] (LBeh,)

		(Entered: 12/09/2004)
12/09/2004	31	APPEAL JUDGMENT from USCA as to 27 - affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 12/09/2004)
01/25/2005	32	MANDATE of USCA as to 27 Notice of Appeal filed by Keith Carabell, June Carabell, Harvey Gordenker and Frances Gordenker, affirmed. [Appeal Case Number 03-1700] (LBeh,) (Entered: 01/25/2005)
05/04/2005	33	LETTER from SC re 27 Notice of Appeal - petition for a writ of certiorari was filed and placed on the 4/15/2005 docket. [Appeal Case Number 04-1384] (LBeh,) (Entered: 05/04/2005)

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 03-1700
Filed: 6/6/03
Nsuit: 2863 Social Security: DIWC/DIWW
Carabell, et al v. US Army Corps Engr, et al
Appeal from: Eastern District of Michigan at Detroit

Case type information:
1) Civil
2) United States as party
3) civil rights

Lower court information:

District: 0645-2 : 01-72797
Trial Judge: Paul D. Borman, District Judge
Date Filed: 7/26/01
Date order/judgment: 4/1/03
Date NOA filed: 4/25/03

Fee status: paid

Prior cases:
None
Current cases:
None

Docket as of October 18, 2005 9:10 pm Page 1

JUNE CARABELL
Plaintiff - Appellant

Timothy A. Stoepker
FTS 223-3598
313-223-3500
[COR LD NTC ret]
Paul R. Bernard
FTS 223-3598
313-223-3500
[COR ret]
Dickinson, Wright, PLLC
500 Woodward Avenue
Suite 4000 One Detroit Center
Detroit, MI 48226-3425

KEITH CARABELL
Plaintiff - Appellant

Timothy A. Stoepker
(See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

HARVEY GORDENKER
Plaintiff - Appellant

Timothy A. Stoepker
(See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

FRANCES GORDENKER
Plaintiff - Appellant

Timothy A. Stoepker
(See above)
[COR LD NTC ret]
Paul R. Bernard
(See above)
[COR ret]

PACIFIC LEGAL FOUNDATION

M. Reed Hopper

Amicus Curiae FTS 419-7747
916-419-7111
[COR LD NTC ret]
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant - Appellee
Todd S. Kim
FTS 514-8865
202-514-2762
[COR LD NTC gvt]
U.S. Department of Justice
Land & Natural Resources Division
P.O. Box 23795

L'Enfant Plaza Station
Washington, DC 20026

Laurel A. Bedig
FTS 514-8865
202-305-0331
[gvt]
U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986

Washington, DC 20026-3986

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant - Appellee

Todd S. Kim
(See above)
[COR LD NTC gvt]

Laurel A. Bedig
(See above)
[gvt]

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03-1700 Carabell, et al v. US Army Corps Engr, et al

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER

Plaintiffs - Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendants - Appellees

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03-1700 Carabell, et al v. US Army Corps Engr, et al

6/6/03 Civil Case Docketed. Notice filed by Appellant June Carabell, Appellant Keith Carabell, Appellant Harvey Gordenker, Appellant Frances Gordenker. Transcript needed: n (ert)

6/6/03 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 7/16/03 ; appellee brief due 8/18/03 ; appendix due 9/11/03; final briefs due 9/26/03 ; . (ert)

6/13/03 APPEARANCE filed by Attorney Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (jts)

6/23/03 APPEARANCE filed by Attorney Timothy A. Stoepker for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

6/23/03 APPEARANCE filed by Attorney Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

6/23/03 PRE-ARGUMENT STATEMENT filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (jts)

7/17/03 PROOF BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June

Carabell. Certificate of service date 7/16/03 Number of Pages: 46 (10018). [03-1700] (rgf)

7/17/03 Request to require oral argument filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (rgf)

7/23/03 APPEARANCE filed by Attorney M. Reed Hopper for Amicus Curiae Pacific Legal [03-1700] (ert)

7/23/03 BRIEF filed by M. Reed Hopper for Amicus Curiae Pacific Legal on behalf of the appellants. Copies 7. Certificate of service date 7/22/03 . [03-1700] "with consent" (ert)

7/25/03 Appellee MOTION filed to extend time to file brief (requesting 30 days). Motion filed by Todd S. Kim for the Appellees. Certificate of service date 7/24/03 . [03-1700] (dtk)

7/31/03 LETTER SENT by csmgr resetting briefing schedule: [03-1700] granting motion to extend briefing [2786511-1] filed by Todd S. Kim [03-1700] appellee brief now due 9/17/03 ; appendix now due 10/8/03 ; appellant final brief now due 10/29/03 ; appellee final brief now due 10/29/03 . (jts)

9/18/03 PROOF BRIEF filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 9/17/03 . Number of Pages: 56+(13322). [03-1700] (rgf)

9/18/03 Request to require oral argument filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (rgf)

10/7/03 PROOF REPLY BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell Certificate of service date 10/6/03 [03-1700] 14+++ pages. Final reply brief due 10/29/03 . [03-1700] (rgf)

10/9/03 APPENDIX filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell. Copies: 05 - 3 VOLUMES; 870 pages.. Certificate of service date 10/8/03 [03-1700] (rgf)

10/29/03 FINAL BRIEF filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Copies: 07. Certificate of service date 10/28/03 . Number of Pages: 57++(13274). [03-1700] (rgf)

10/29/03 Request to require oral argument filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr [03-1700] (rgf)

10/30/03 FINAL BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June

Carabell. Copies: 07. Certificate of service date 10/29/03 Number of Pages: 46. [03-1700] (rgf)

10/30/03 Request to require oral argument filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell [03-1700] (rgf)

10/30/03 FINAL REPLY BRIEF filed by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell. Copies: 07 Certificate of service date 10/29/03 Number of Pages: 14. [03-1700] (rgf)

2/12/04 ADDITIONAL CITATION filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 2/11/04 [03-1700] (jts)

5/28/04 Oral argument date set for August 11, 2004 in court room 607. Notice of argument sent to counsel. [03-1700] (pjm)

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03-1700 Carabell, et al v. US Army Corps Engr, et al

8/9/04 ADDITIONAL CITATION filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 8/5/04 [03-1700] (jts)

8/11/04 CAUSE ARGUED on 8/11/04 by Paul R. Bernard for Appellant Frances Gordenker, Appellant Harvey Gordenker, Appellant Keith Carabell, Appellant June Carabell, Todd S. Kim for Appellee

EPA, Appellee US Army Corps Engr before Judges Batchelder, Gibbons, Stafford. [03-1700] (kal)

9/27/04 OPINION filed : AFFIRMED the district court's decision granting summary judgment to the defendants. [03-1700], decision not for publication pursuant to local rule 28(g) [03-1700] . Alice M. Batchelder, Circuit Judge, Julia S. Gibbons, Circuit Judge, William H. Stafford, Authoring, District Judge (N/FL). 11/15/04 designated FOR PUBLICATION (jts)

9/27/04 JUDGMENT : AFFIRMED . (jts)

10/12/04 Appellee MOTION filed to publish court's decision . Motion filed by Todd S. Kim for Appellee EPA, Appellee US Army Corps Engr. Certificate of service date 10/8/04 . [03-1700] (jts)

11/15/04 ORDER filed granting the appellees' motion to publish the court's decision. [03-1700] Alice M. Batchelder, Julia S. Gibbons, Circuit Judges; William H. Stafford, District Judge. (stb)

11/15/04 TENDERED : petition for rehearing en banc which is three days late from Paul R. Bernard for Appellants Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [03-1700] (blh)

11/23/04 PETITION for en banc rehearing filed by Paul R. Bernard for Appellants Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell. Certificate of service date 11/12/04. [03-1700] (blh)

1/10/05 ORDER filed denying petition for en banc rehearing [3063145-1] filed by Paul R. Bernard [03-1700]. Alice M. Batchelder, Julia S. Gibbons, Circuit Judges; William H. Stafford, District Judge. (blh)

1/18/05 MANDATE ISSUED with no cost taxed [03-1700] (rgf)

4/19/05 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant June Carabell, et al. Filed in the Supreme Court on 04-11-05 , Supreme Ct. case number: 04-1384 . [03-1700] (swh)

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03-1700 Carabell, et al v. US Army Corps Engr, et al

10/18/05 U.S. Supreme Court letter filed granting petition for writ of certiorari [3145665-1] filed by June Carabell Supreme Court No. 04-1384 [03-1700] Case is consoliated with Sup. Ct. No. 04-1034 and a total of one hour is allotted for oral argument. . Filed in the Supreme Court on 10-11-05 . (swh)

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STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 301, Inland Lakes and Streams, and Part 303, Wetland Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of June and Keith Carabell and Frances and Harvey Gordenker

File No. 93-14-602

PROPOSAL FOR DECISION

Richard A. Patterson Administrative Law Judge

DATED: August 12, 1998

This case involves the Department of Environmental Quality's (Department) denial of a permit application filed by June and Keith Carabell and Frances and Harvey Gordenker (Petitioners). The permit application proposed to place fill in a regulated wetland in order to facilitate the construction of a housing development.

The application for a permit was filed under the provisions of Part 303, Wetland Protection, of Natural Resources and Environmental Protection Act (NREPA). Although the case is captioned to include consideration of Part 301, Inland Lakes and Streams, of NREPA, there is no anticipated activity, nor was there any evidence presented as to impacts on the Sutherland

Oemig Drain adjacent to the subject parcel. Therefore, an analysis of the proposed activity under the criteria of Part 303 is unnecessary.

On March 30, 1994 a petition for contested case hearing on the denial was filed with this Tribunal. Upon the request of Parties, the case was held in abeyance to facilitate informal settlement negotiations. While the case was held in abeyance written Status Reports were periodically filed with this Tribunal, the last of which, dated May 23, 1997, had the Petitioners reporting an impasse in the negotiations and requesting a hearing be scheduled. A pre-hearing conference was conducted on July 17, 1997, to prepare the case for hearing. A contested case hearing was conducted in this matter on October 27, 28, 29 & 30, 1997, January 27, 28, 29 & 30, 1998, and February 2, 1998. The Parties filed post-hearing briefs and proposed findings of fact and conclusions of law. Those filings have been reviewed and utilized to the extent they accurately reflect the record and the law. Proposed Findings and Conclusions not addressed were either found to be unsupported by the record or unnecessary in preparing this Proposal for Decision.

JURISDICTION

The hearing was requested under the provisions of Part 303, Wetland Protection, of NREPA, MCL 324.30301 et seq.; MSA 13A.30301 et seq., and the administrative rules, and was conducted pursuant to the provisions of the Michigan Administrative Procedures Act, MCL 24.201 et seq. ; MSA 3.560 (101)et seq.

The Department suggests this case should be held in abeyance pending resolution of a Motion for

Reconsideration of a recent order of the Michigan Supreme Court in Friends of the Crystal River v. Kuras, et al., Mich ____; 577 NW2d 684 (March 31, 1998). This Tribunal is not inclined to grant that request in that the essence of the motion addresses a sophisticated and esoteric issue over a set of unusual circumstances involving the interplay of state and federal regulation. Furthermore, to further delay a decision in this case, which has been pending since March 30, 1994, based on a decision by the Supreme Court which will not resolve the contested issues is unfair and prejudicial to the Petitioners.

The Department has also expressed concern over the Petitioners reliance on the reasoning of Administrative Law Judge (ALJ) William C. Fulkerson and the Michigan Court of Appeals in Kuras regarding the burden of proof, the required analysis of Part 303 criteria and the interpretation of the meaning of feasible and prudent alternatives. While the Supreme Court declared in Kuras that the " . . . decisions of the ALJ and the MRC are declared to be of no precedential force and effect", the Order is clearly aimed at the issue of jurisdiction or to issue a permit, as opposed to the underlying reasoning expressed. That reasoning, involving the existence or non-existence of feasible and prudent alternatives, is. persuasive, if not precedential

PARTIES

Mr. and Mrs. Keith Carabell and Mr. and Mrs. Harvey Gordenker are the applicants for a permit pursuant to Part 303 and are represented by Timothy A. Stoepker, Esq. The professional staff of the Michigan Department of Environmental Quality is charged with the day-to-

day implementation of Part 303. The Department is represented by Elaine Dierwa Fischhoff , Assistant Attorney General .

At the hearing the Petitioners presented five (5) witnesses: Mr. Keith Carabell; Mr. Robert Leighton, Land Planner and Wetlands Consultant; Mr. Patrick Meagher, C. P., Urban Planning Consultant to Chesterfield Township; Mr. Bernard C. Sieber, P.E., Real Estate Development Engineering Consultant and Mr. Jack Hernandez, Jr., Macomb County Real Estate Broker.

The Department presented six (6) witnesses: Mr. Barry Horney, DEQ, Southeast Michigan District Supervisor; Mr. Ernie Kafcas, Department of Natural Resources, Wildlife Biologist; Mr. Kurt Childs, DEQ, Land and Water Management Analyst; Mr. Rob Zbiciak, DEQ, Land and Water Quality Manager; Mr. Don Gunning, President, Lake St. Clair Advisory Committee; and Mr. Jason Horton, Esq., Attorney and Real Estate Developer. Mr. James Piggush, Assistant Attorney General, testified with respect to a Motion to Disqualify Mr. Mark Thomas as a witness for the Petitioners. However, Mr. Thomas was withdrawn as a witness previous to a ruling on the motion.

The Petitioner introduced twenty six (26) exhibits, which are labeled numerically. The Department introduced twenty five (25) exhibits, which are labeled alphabetically. A list and description of these exhibits is attached to this Proposal for Decision

STIPULATIONS ON THE RECORD

At the commencement of the hearing the Parties entered into the following stipulations:

1) The Petitioners are proper applicants for a permit.
2) The activity proposed in the application is regulated.
3) A permit is necessary.

I find these stipulations are legally correct, and I adopt them as findings. Stipulations entered into by the parties shall be used as evidence at the hearing and are binding. MCL 24.278; MSA 3.560 (178); Dana Corporation v. Employment Security Commission, 371 Mich 107, 110 (1963).

FINDINGS OF FACT
PROCEDURAL HISTORY

The subject parcel was the subject of an application filed in 1987 by Seminole Investment Company, under a purchase agreement with the Petitioners, which proposed to excavate the site and build a 200 unit condominium complex. A permit for that activity was denied by the then Michigan Department of Natural Resources and not administratively contested.

A lawsuit alleging the 1987 denial constituted a takings, and requesting compensation, was filed by the Petitioners in the Michigan Court of Claims, which subsequently dismissed the action. The Michigan Court of Appeals upheld the dismissal, stating that while the Petitioners had established that one profitable use of the property had been denied, they had not applied for or explored other proposals which may be economically feasible. Carabell et. al. v Michigan Department of Natural Resources, 191 Mich. App. 610; 478 NW2d 675

(1991). The Michigan Supreme Court denied leave. Id., 439 Mich 980; 483 NW2d 858 (1992).

The present application for permit was filed on June 10, 1993. Additional information was requested by the Department on July 21, 1993 and supplied on November 29, 1993. The application was then deemed administratively complete and public noticed on December 2, Adverse comments were received from the Lake St. Clair Advisory Committee and the U.S. Fish and Wildlife Service. Mr. Kurt Childs inspected the site and prepared a Project Review Report on February 8, 1994. Exhibit D-P. In the denial letter the Department suggested further revision of the project and requested the Petitioners submit a modified proposal. On April 27, 1994, subsequent to the filing of the petition for contested case hearing, Mr. Childs revisited the site and prepared a second Project Review Report which located available upland consisting of an area approximately 100 by 240 feet. Exhibit R-R. He had previously visited the site and prepared a Project Review Report. Exhibit R-P.

LOCATION AND NATURE OF THE SUBJECT PROPERTY

The subject parcel is located in Chesterfield Township, Macomb County, Michigan. The property consists of 19.6 acres, of which 15.96 acres are wetlands. The parcel is triangular in shape and fronts on Donner Road on its westerly border. The hypotenuse of the triangle runs from the southwesterly corner of the parcel at a 45 degree angle to the northeast corner and is separated from the. adjacent property by the Sutherland-Oemig Drain. The northerly border abuts a multi-family

residential development. The upland on the property is adjacent to the west and southeast perimeters.

The Petitioners originally proposed to excavate 28,000 cubic yards of soil and to construct a 130 unit town house complex on the parcel. Exhibit D-0. During the pendency of this case the Petitioners submitted two (2) revised proposals depicted in Exhibits P-78 and P-79, both of which entail the construction of 112 units, reducing the amount of wetland involved to 12.2 acres. Exhibit P-78 involves preservation of 3.74 acres of wetland, while Exhibit P-79 involves wetland enhancement of the same acreage. The Department contends a development of 24 units on the upland fronting Donner Road, with some intrusion into the wetland, is a viable alternative to the activity proposed in the permit, or the subsequent proposals. Therefore, the analysis under Part 303 must focus on whether the activity proposed in the permit application, the Petitioner's subsequent proposals, or the Department's alternative are allowable under the statutory criteria.

TESTIMONY ON THE RECORD

As previously discussed, the Parties stipulated to the presence of regulated wetland on the subject parcel. With that stipulation, Part 303, specifically section 30311, next requires the following criteria be reviewed for each permit application and mandates findings be made with regard to each criterion.

(1)A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived

from the activity, and that the activity is otherwise lawful.

A determination of whether the project is in the public interest is made by applying criteria discussed in Part 303. The Parties have stipulated a permit is necessary and I have adopted that as a Finding of Fact.I further find, as a Matter of Fact, the proposed activity is otherwise lawful.

(2) In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment and destruction. The following general criteria shall be considered:

(a) The relative extent of the public and private need for the proposed activity.

Mr. Patrick Meager, in his capacity as an urban planning consultant, testified to a need for 150 senior citizen residences in Chesterfield Township. The demographics of the Petitioners' proposals were not specified, but testimony was elicited that the property is zoned RM-3 , which allows for the proposed use and that it is consistent with the master plan. The record also reflects a letter from Chesterfield Township dated November 6, 1987, which encouraged the approval of the original multi-family proposal: Exhibit P-21. There would appear, therefore, to be a public need for the proposed activity.

Similarly, the record indicates a private need for the proposed activity. There was a great deal of testimony regarding the Petitioners having to develop the property in some fashion so as to realize a return on their investment.

(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

There would not appear to be any available alternative locations for the proposed activity. The immediate area is fully developed. Mr. Meagher testified there did not appear to be any undeveloped property in Chesterfield Township which is zoned to accommodate Petitioners' multi-family proposal, with the exception of a parcel located north of 21 Mile Road and west of 1-94. There was no evidence addressing the characteristics of that site, or its availability. Based on the foregoing, I find, as a Matter of Fact, there is no feasible and prudent alternative location available.

The issue of feasible and prudent alternative methods is much more complex. The 1987 application contemplated filling in the entire wetland to facilitate the construction of 200 residential units. The 1993 application initially requested 130 units, which was subsequently revised to 112 units, with alternative provisions for preservation. or enhancement of the remaining wetland. Preservation essentially entails maintaining, or restoring the area outside the developed envelope to its natural state, in this case wetland. Enhancement involves dredging to varying depths and planting of diverse plant species to improve the quality, function and aesthetics of the wetland. Both

of the 112 unit proposals involve the installation of a detention pond, as well. The Department is insistent on mitigation in response to those proposals, or in the alternative, a much smaller project involving 24 units adjacent to Donner Road.

Based on the foregoing, there are three alternatives before this Tribunal:

1. 112 units with preservation.
2. 112 units with enhancement
3. The Department alternative of 24 units.

Each of these alternatives will be addressed separately. However, because the Department is insistent on mitigation in response to proposals 1 and 2, that issue will be addressed first.

1988 ARCS, R 281.925 provides for mitigation and addresses the necessary determination in this regard. Under subsection (4) (c) it must be determined "[T]hat it is practical to replace the wetland resource values which will be unavoidably impacted". The rule does not quantify the amount of wetland to be created through mitigation to compensate for the loss. However, Mr. Horney testified, as a general rule, the Department requires mitigation in the amount of 1 1/2 times the amount of wetland lost. However, this "general rule" is not binding and each application must be reviewed on its merits; including the necessity for mitigation and the ratio.

Proposals 1 or 2 would result in 12.2 acres of wetland being lost, which computes to a required mitigation of 18.3 acres under the Department's "general rule". Both

Mr. Robert Leighton and Mr. Bernard Sieber estimated the cost of land acquisition and creation of new wetland to be $45,000 to $50,000 an acre, which computes to a mitigation cost of $823,000 to $915,000 for Proposals 1 or 2.

The Leighton/Sieber calculations were disputed by Mr. Jason Horton. First, he opined that land which is undevelopable, and presumably available because it is either too small, contaminated, or land-locked, could be purchased for a little as $5,000 an acre. However, no specific sites were put forth, and the availability and desirability of property which meets these specifics is questionable. he also disputed the figure of $13,000 an acre for planting vegetation built in to the Leighton/Sieber estimate, stating it could be accomplished for $2,000 an acre. Lastly, he believes the figure of $13,000 an acre for excavation is too high in that it is based on going to a depth of 2 1/2 feet, which is unnecessary. He has seen wetland mitigation accomplished by excavation to a depth of 1 foot, reducing that cost by approximately $4,000 an acre. Mr. Horton testified a total mitigation cost of approximately $11,000 an acre is more accurate, which for Proposal 1 or 2 equates to slightly over $200,000.

In addition, Mr. Rob Zbiciak testified to the possibility of. a statewide wetland mitigation banking program being implemented in the future. However, this testimony is speculative and has no probative value.

As stated in R 281.925, in order for mitigation to occur, there must be a finding it is practical. The American Heritage College Dictionary (1993), as applicable in this context, defines practical as:

"Of, relating to, governed by, or acquired through practice or action, rather than theory, speculation or ideals."

As discussed above, the record in this matter as it pertains to mitigation can fairly be characterized as theoretical and speculative. Therefore, a finding that mitigation is practical under R.281.925 is not possible.

Regarding the Department's proposal of 24 units on the edge of the property fronting Donner Road, Mr. Sieber estimated a loss to the Petitioners of $18,486 per unit with mitigation at 11/2 times the lost wetland, or $8,027 with on site wetland enhancement. Transcript 1/27/98, pg. 88. Additionally, if neither mitigation or enhancement were required there would still be a loss per unit under the Department's proposal. Transcript 1/27/98 pg. 9-1.

Conversely, Mr. Horton testified that a return of over $48,000 per unit could be possible, exclusive of land costs. Transcript 1/30/98, pg. 156. However, Mr. Horton did not consider architectural or construction management fees, and be utilized substantially lower building costs per square foot than did Mr. Sieber. There is also a question as to the proper method of calculating debt service. There is, therefore, a question whether the Department's proposal is economically viable, which despite Mr. Horton's testimony, would appear doubtful. Although Mr. Horton has considerable experience in the field, many of his assumptions were based on larger projects located outside of Macomb County which were not necessarily comparable in size or price to the instant project. However, both Mr. Sieber and Mr. Jack Hernandez based their testimony

on whether there exists a feasible and prudent alternative to the proposed activity on local market conditions.

It is obviously not possible to precisely project profitability or lack of it on the testimony presented. But the issue to be considered is the existence of a feasible and prudent alterative. In that regard, the 24 unit project is feasible in the sense that it can physically be accomplished. Whether or not it is prudent in an economic sense is doubtful.

Of the two alternatives proposed by Petitioners, the second involving enhancement is clearly more prudent. This is true because, as Mr. Leighton testified, the existing wetland is of minimal value, and while the proposed project would permanently remove a majority of it, the enhancement area, if done properly, would greatly increase wetland function in that area. He also testified enhancement would significantly improve water quality by filtering runoff before it went into the drainage system and would provide greater diversity of plants and wildlife. Aesthetics, in his opinion, would also be improved. Transcript 10/28/97, pg. 397.

The history of this case demonstrates a significant downsizing of the project from the initial application, for 200 units utilizing all of the wetlands to the current proposal involving 12.2 acres of the 15.96 acres of wetland, with enhancement or creation of 3.74 acres of wetland. Exhibit P-79. This alternative is obviously feasible and, as discussed above, is also prudent.

Based on the above analysis, I find, as a Matter of Fact, a feasible and prudent alternative to the activity

proposed in the application for a permit is the placement of fill in 12.2 acres of wetland to facilitate the construction of 112 residential units with enhancement of the remaining 3.74 acres of wetland.

(c) The extent and permanence of the beneficial or detrimental effects which the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

Mr. Leighton testified the wetland does not provide any beneficial effect on the surrounding public and private uses. This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents discharge of water both to and from the site, and the Sutherland-. Oemig Drain is bermed, which prevents the discharge of water either into it or from the drain. Mr. Leighton characterized the site as being tantamount to a bath tub, in that the only water coming onto and being retained on the parcel is from rainfall. Due to the presence of clay soils on the site it is not permeable and ground water neither runs from or onto the site.

The Department did not refute this testimony, but did offer the testimony of Mr. Zbiciak that, "there is nothing in the statue that allows us to define something as a marginal wetland. It either meets the definition of a wetland based on the statute or it does not." Transcript 1/27/98, pg. 119. However, "this is a legal opinion and is inaccurate. While Part 303 does not qualify wetlands, they are either regulated or they are

not, the legislature requires findings regarding the benefit the wetland provides when reviewing a permit application.

Mr. Kurt Childs testified regarding what are general concerns over losing virtually all of the subject wetland and cumulative impacts which may result. However, he essentially agreed with Mr. Leighton as to the soil composition on the site. Although Mr. Childs determined the presence of Toledo soils through the county soil survey, he described that soil as "slightly more permeable than straight clay.". Transcript 1/28/98, pg. 32. He agreed with the U.S. Fish and Wildlife Service's concerns over habitat loss, but did not have sufficient information regarding whether the wetland was serving to protect subsurface water or acting to recharge groundwater. In addition, he could not testify that the wetland was acting as a biological and chemical oxidation basin. He "guessed" it may trap sediments in the event of an overflow of the adjacent drain. Transcript 1/28/98, pg. 36.

Based of the above testimony, the benefits provided by a wetland: flood and storm control; protection of subsurface water resources; pollution treatment; erosion control and sources of nutrients would not be effected by the proposed activity. As noted later under the analysis of subsection (e) fish are not .present and wildlife and wildlife habitat are not significant considerations.

The proposed wetland enhancement will serve to improve the value of the area, but will not replace the wetland as it currently exists on an acre for acre basis. However, as previously discussed the record fails to

establish that the value of the wetland on the site as it presently exists is substantial, but rather it demonstrates the wetland has, at best, very limited functional value. This criteria requires a balancing of the beneficial and detrimental effects of the uses, including the wetland uses. The balance as to the proposed use of this site favors the proposal of the Petitioners for wetland enhancement.

I have previously found the Petitioners proposed use with wetland enhancement is one to which the property is suited under an economic analysis and under local land use planning. Additionally, I find, as a Matter of Fact, the benefits for both private and public use will be substantial, the impact will be long term and the physical impact on the property, specifically the, loss of whatever values the 12.2 acres of wetland provides, will be permanent. However, I further find, as a Matter of Fact, the wetland currently provides little benefit and the proposed wetland enhancement will provide greater benefit than any detriment resulting from the loss of 12.2 acres of wetland.

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activi-ties in the watershed.

But for the subject parcel, the immediate surrounding area is virtually fully developed. There will, therefore, be little if any further activity in this area of the watershed. As stated previously, although the parcel is adjacent to the Sutherland-Oemig Drain, which ultimately flows into Lake St. Clair, there is not a surface water connection to the drain. Therefore, I find, as a Matter of Fact, there will no impact on the

watershed, which is the wetland as it currently exists, by the proposed activity.

(e) The probable impact on recognized historic, cultural, scenic, ecological or recreational values and on the public health or fish or wildlife.

There is no evidence on the record addressing historic, cultural values or any impact on the public health. Scenic values are subjective and nebulous, as borne by the fact the Department prefers the scenic value of the pristine wetland and the Petitioners, as well and Chesterfield Township officials., (Exhibit P-21), would prefer the site be developed. Fish are not a factor as none are present or this site.

The site is predominantly forested wetland and the lack of any significant understory in the interior, which is necessary in providing cover and food supply, undermines wildlife value. The only significant understory is located on the perimeter (Robert Leighton, 10.,29/97, page 532) which would not be significantly disturbed under any proposal. Mr. Leighton observed only a rabbit and a few possible groundhog burrows on the parcel, and the presence of song birds, but no waterfowl. According to the testimony of Mr. Ernie Kafcas, the site is currently conducive to migration of water fowl and other neo-tropical bird species . He further stated the property would be conducive for certain reptiles and amphibians, as well as suburban type mammals such as raccoon and rabbit.

Based on the foregoing, I find, as a Matter of Fact, wildlife value of the site is minimal. I further find, as a

Matter of Fact, the proposed project's probable impact on the other criteria would be de minimus.

(f) The size of the wetland being considered.

The wetland on the subject property consists of 15.96 acres. Exhibit P-32. The Petitioners' revised proposals would each impact 12.2 acres. The Department's alternative would involve the placement of fill in approximately 2 to 4 acres of wetland.

(g) The amount of remaining wetland in the general area.

The area is fully developed and, therefore, there is virtually no remaining wetland. As previously discussed, the Petitioners' revised proposals would eliminate 12.2 acres out of 15.96 acres, leaving 3.76 acres of wetland on the subject parcel. The Department's proposal would eliminate 2 to 4 acres of wetland, leaving approximately 13 acres.

(h) Proximity to any waterway.

Although the parcel is adjacent to the Sutherland Oemig Drain, it is not connected to the facility. The parcel is isolated from any other water body by land on all sides. Although the distance was not quantified the parcel is a substantial distance from Lake St. Clair.

(i) Economic value, both public and private, of the proposed land charge to the general area.

The economic value of the parcel would be greatly enhanced from the perspective of the public as well as

the Petitioners. The Petitioners would, if allowed to develop the property, realize a return on their investment and the township would benefit from a substantial increase in its tax base, which would outweigh any increased costs of services. Those involved in the construction and marketing of the development would also receive income from the project.

(3) In considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.

There have been no findings of other state agencies.

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

(a) he proposed activity is primarily dependent upon being located in the wetland

(b) A feasible and prudent alternative does not exist.

The criteria to be considered pursuant to MCL 324.30302 (b)(i) through (vi) would not be materially adversely effected by the activity proposed in Exhibit P-79. Furthermore, for the reasons previously stated, said activity will not result in an unacceptable disruption to the aquatic resources.

The available upland on the site is too small to accommodate the proposed activity and it cannot be accomplished without impacting the wetland to some extent. Therefore, the proposed activity is dependent upon being located in the wetland. This Tribunal has previously found that a feasible and prudent alternative exists to the activity proposed in the permit application and the Department's proposal.

CONCLUSIONS OF LAW

1. I conclude, as a Matter of Law, based on the stipulation of the Parties, the subject site is comprised of regulated wetland and a permit is required pursuant to Section 30304(a) and (b) of Part 303 of NREPA.

2. I conclude, as a Matter of Law, based on the stipulation of the Parties, the application for a permit was processed in a procedurally proper manner and June and Keith Carabell and Frances and Harvey Gordenker are the proper Petitioners in this matter.

3. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit P-79 is in the public interest.

4. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit P-79 will not cause an unacceptable disruption to aquatic resources.

5. I conclude, as a Matter of Law, the proposed project as depicted in Exhibit P-79 is wetland dependent.

6. I conclude, as a Matter of Law, the proposed activity as depicted in Exhibit--P-7.9 is otherwise lawful.

7. I conclude, as a matter of Law, there is feasible and

prudent alternative to the activity proposed in the application for a permit, specifically placement of fill in the wetland to facilitate the construction of 112 residential units with wetland enhancement as depicted in Exhibit P-79.

PROPOSAL FOR DECISION

Based upon the Findings of Fact and Conclusions of Law, it. is proposed that a Final Order be issued permitting the placement of fill on the subject parcel to facilitate the construction of 112 residential units with wetland enhancement as depicted in Exhibit P-79.

Dated: August 12, 1998

Richard A. Patterson Administrative Law Judge

RE: Part 303 Wetland Protection and Part 301 Inland Lakes & streams of the Natural Resources and Environmental Protection Act (NREPA) , 1994 PA 451, as amended.

Petition of June & Keith Carabell and Francis & Harvey Gordenker

File No. 93-14-602

EXHIBITS

Respondent's Exhibits

A Tax Statement for 1969, Township of Chesterfield, due December 1st, No. 776, page 132.

B Letter dated February 22, 1994, from Kurt Childs, Analyst and Barry J. Horney, District Supervisor, Livonia, Michigan Department of Natural Resources (DNR), Land & Water Management Division (LWMD) to June Carabell, Keith Carabell, Harvey Gordenker, and Frances. Gordenker.

C Letter dated September 26, 1996, from Elaine Dierwa. Fischhoff, Assistant Attorney General (AAG) , Natural.. Resources Division (NRD), Livonia to Timothy A. Stoepker, Abbott, Nicholsori, Quilter, Esshaki & Youngblood., P.C.

D Letter dated July 17, 1996, from Timothy Stoepker to Jeremy M. Firestone, Esq., AAG, NRD.

E Letter dated October 31, 1956 from Timothy A. Stoepker to Elaine Dierwa Fischhoff.

F Ordinance No. 110, Zoning Ordinance Charter Township of Chesterfield, Macomb, Michigan, Published by The Bay Voice, September 11, 1996.

G Wetland Permit Application: Carabell, Leslie and Company Residential Development, Chesterfield Township, Michigan, June 1993.

H Letter dated June 25, 1993, from Jane A. Prochaska, Robert Leighton Associates, Land Design to Les Thomas, MDNR, LWMD-PCU.

I Letter dated November 17, 1993, from Jane A. Prochaska, Robert Leighton Associates, Land design to Sally Stoll, MDNR, LWMD-DCU.

J Copy of The Charter Township of Chesterfield Zoning Ordinances, not current.

K Letter dated September 14, 1987, from Edward W. Pratt, Partner, Wake-Pratt Companies to DNR, Attention Harry Horney.

L Project Review Report on application number 87-14-963W, signed by Robert P. Zbiciak, Water Quality Specialist, LWMD on December 10, 1987.

M Interoffice Communication dated March 28, 1988 to File No. from Robert P. Zbiciak.

N Interoffice Communication dated March 25, 1988 to Rob Zbiciak from Ernest Kafcas, Wildlife Habitat Biologist.

O Letter dated March 4, 1994 from Robert Perciasepe,

Assistant Administrator, United States Environmental Protection Agency to Roland Harmes, Director," MDNR.

P Project Review Report on application number 93-14-602, signed by Kurt Childs, dated February 8, 1994.

Q Letter dated February 22, 1994 from Kurt Childs, Analyst and Marry j. Horney, District Supervisor, Livonia, Michigan DNR, LWMD to June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker.

R Project Review Report on application number 93-14-.602, signed by Kurt Childs, dated April 27, 1994.

S Draft Interoffice Communication from Kurt Childs to Elaine Dierwa Fischhoff .

T Notebook paper drawing, 8 1/2" x 11".

U Photo copy of a plan with Sieber notations on sewer and water.

V Photo copy of a plan.

W Donner Road Condominiums, Engineer's Preliminary Cost Estimate, Job No. 97-096, dated January 12, 1998.

X Notebook paper drawing, 81/2" x 11".

Y Preliminary Proforma Projections (24 Stacked Ranch Concept), January 29, 1998.

Plaintiff's Exhibits - all Photocopied

1 Resume of Robert C. Leighton, Principal.

3 Land Contract, made on March 28, 1969 between Zenith Steel & Metal Co., James A. Michael, Joseph Michaels and Charles R. Towner and Robert Piersl, Keith A. Carabell, Stanton P. Bockner, Harvey Gordenker and Robert Palmer.

5 Warranty Deed dated July 5, 1971, liber 2662, page 471.

16 Agreement of Sale, Offer to Purchase Real Estate, Accepted Offer Dated 07/08/87, Investment Co., a Michigan Co-Partnership.

18 Offer of Purchase of Real Estate signed by Edward W. Pratt and Harvey Gordenker, Edward W. Pratt, Purchaser in March, 1987 with attachments.

21 Letter dated November 6, 1987 from, James H. Rollard, Supervisor, Chesterfield Township to the State of Michigan Department of Natural Resources on File No.87-14-953W.

23 Certified Letter dated December .30, 1987 from Robert J. Hornet, District Supervisor, Land & Water Management Division (LWMD) , Department of Natural Resources (DNR) to Semirole Investment Company.

24 Memorandum dated January 20, 1993 from Ashok K. Punjabi, District 10 Headquarters, LWMD.

27 Wetland Permit Application: Carabell, Leslie and Company, Residential Development, Chesterfield Township, Michigan, June 1993.

31 Letter dated December 17, 1993 from Donald gunning, Vice-Chairperson, MUCC Wetlands Watch to Barry Horney, Land Resource Programs Supervisor, DNR.

32 Public Notice dated December 2, 1993 on File No. 9314-602 from the DNR, LWMD.

35 Letter dated January 14, 1994 from Charles M. Wooley, Field Supervisor, United States Department of the Interior., Fish and Wildlife Service to the Wetlands Coordinator, U.S. Environmental Agency, Wetlands and Watersheds Section P (WQW-16J).

39 Two-page review of facts and information found pertinent to making a decision on application for permit number 93-14-650, dated 02/17/94 by Kurt Childs.

57 Interoffice Communication dated May 31, 1994 from Ernie Kafcas, Wildlife Habitat biologist, District 10, DNR to Kurk Childs, LWMD, District 10, DNR.

71 Interoffice Communication from Kurk Childs to Barry Horney, comments on applicant's letter dated 10/31/96.

75 Fourteen pages, beginning with Sec. 1201. Minimum Site and Building Requirements, 15.371 (Rev. 11/90).

76 Zoning/Location Map, Wetland Map, Chesterfield Township, Macomb County, Michigan, Planner: Robert

Leighton Associates, Inc.

77 Zoning/Location Map, Site Data, Preliminary Site Plan (Multi-Family Attached Townhomes), Planner: Robert Leighton Associates, Inc.

78 Zoning/Location Map, Site Data, Preliminary Site Plan B (Multi-Family Attached Townhouses) , Planner: Robert Leighton 79 Zoning/Location Map, Site Data, Preliminary Site Plan A (Multi-Family Attached Townhomes), Planner: Robert Leighton Associates, Inc.

80 Zoning Map, Chesterfield Township, Macomb County, MI, Township Planning Commission.

81 Chesterfield Charter Township, Master Plan.

81b Black and White Aerial Photograph, Chesterfield Charter Township.

82 Photocopies of six photographs includes one large panoramic view.

83 Cross Sections, Chesterfield Charter Township, Macomb County, MI, Planner: Robert Leighton Associates, Inc.

84 Three pages, 25.212, Sec. 6.2 Water Connection Fee.

STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY OFFICE OF ADMINISTRATIVE HEARINGS

SUBJECT: Part 301, Inland Lakes and Streams, and Part 303, Wetland Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Petition of June and Keith Carabell and Frances and Harvey Gordenker

File No. 93-14-602

FINAL DETERMINATION AND ORDER

The above captioned matter was the subject of a contested case hearing resulting in the issuance of a Proposal For Decision dated August 12 , 1998. In a letter dated August 12, 1998, the Office of Administrative Hearings gave the Parties to September 1, 1998, to file written Exceptions to the proposal for Decision. On August 19, 1998, counsel for Mr. and Mrs. Carabell and Mr. and Mrs. Gordenker (Petitioners) filed a letter requesting that the Proposal for Decision be accepted. Counsel for the Department of Environmental Quality {Department) filed a request for an extension of the filing date on September 2 and September 11, 1998. On September 17, 2.998 the Department filed its Exceptions. The matter is now before the Chief Administrative Law Judge of the Office of Administrative Hearings for a final agency decision pursuant to Executive Order 1995-18 and Delegation Letter No. OAH-324.101 et seq.- 01.

This Tribunal has considered the Proposal For Decision, the Parties Exceptions, exhibits, transcripts, pleadings and arguments proposed findings and conclusions not addressed in this Final Determination and Order were found to be unsupported by the record or unnecessary in making a final decision in this contested case.

The Department raises eleven Exceptions to the Proposal for Decision. Exceptions 6, 7, 10 and 11 are not addressed below because they attempt to reargue the facts. In considering these four Exceptions, it is noted that the Administrative Law Judge (ALJ) who heard the testimony is in the best position to consider it and assign to it an appropriate evidentiary value. The ALJ's findings will not be disturbed unless they are not supported by the record or result in a clearly unjust decision. Based on the record in this case, the ALJ' s findings challenged in these Exceptions are supported by the record and do not result in a clearly unjust decision. All other Exceptions are addressed individually.

Exception 1

This exception requests that the Final Order recognize the U.S. Environmental Protection Agency's opposition to the proposed activity and note the need for a separate permit under §404 of the Clean Water Act. The only issue properly before this Tribunal is whether the Petitioners are entitled, under the criteria of Part 303 of the Natural Resources and Environmental Protection Act, to the permit for the requested activity. Any permit issued under Part 303 does not obviate the necessity of receiving, when applicable, approval from

other federal, state or local government agencies. 1988 AACS, R. 281.923(6).

Exception 2

This exception contends the basis for the decision in the Proposal for Decisions in conflict with Part 303 (MCL 324.30301 et seq.) and the Administrative Procedures Act (MCL 24.201 et seq.). In support of this contention the Department cites eight instances where it alleges the ALJ's rulings on admissibility of evidence were improper or the standard of review was inappropriate.

The first premise asserts the Department was prejudiced by evidentiary rulings described as being "arbitrary and capricious". A review of the rulings indicates the questioning was properly limited to correspond to the rules of evidence. Additionally, in reviewing the record there is no support for the contention that the exclusion of evidence, at any point in the proceedings, was prejudicial to the Department's case.

The second premise of this Exception, the standard of review, is also without merit. The Petitioners are entitled to a de novo review of whether they are entitled to the permit based on the evidence adduced during the hearing. This Tribunal is not constrained to look only at the activity proposed in the application, or the activity the Department will permit. Rather, a final agency decision is rendered, based on the record, on what activity, if any, is allowable under Part 303. By its very nature a contested case hearing will generate information from both Parties over and above that utilized by Department staff in deciding on the permit

application. To place a limit such as the Department suggests would turn the process into an examination of whether the Department erred in denying the application. This result would eliminate the de novo nature of this Tribunal's jurisdiction and mandate to render a final agency decision. MCL 24.203(3) and MCL 24.285. The Department's seemingly narrow view of this Tribunal's function as it relates to contested case hearings and final agency decisionmaking is misplaced.

Exception 3

This Exception alleges the evidence does not support the finding that the 112 unit proposal, with on-site wetland enhancement as mitigation, is a feasible and prudent alternative. However, a review of the record supports the finding that under the review mandated by § 30311 (2) (c) the subject wetland is of questionable value, and the proposed enhancement will provide greater benefit than any detriment resulting from any wetland lost. Therefore, the feasible and prudent alternative finding is appropriate under the criteria of Part 303.

This Exception also goes to great length in arguing the Department's real estate expert is more Qualified than the Petitioners' experts. As discussed above, this constitutes an effort by the Department to reargue the facts of the case. The finding will not be disturbed unless it is not supported by, the record or results in a clearly unjust decision. A review of the record does not support reversing this finding.

Exception 4

In this Exception the Department is accurate that the Proposal for Decision lists only one of the three criteria which the Department must determine in considering mitigation proposals 1988 AACS, R 281.925 (Rule 5) Rule 5 consists of two parts, the first deals with the review of mitigation plans, the second with permit conditions. However, contrary to the language of Rule 5, the Department argues, the practicality of mitigation is not a proper issue for consideration.

Rule 5 sets forth the conditions which must be met if the Department is to impose mitigation as a condition of a permit in order to improve on-site wetlands, or create a new wetland to replace one lost to the proposed activity. In this case, off-site mitigation to the extent and nature desired by the Department is precluded. The alternative plans proposed to either preserve a portion of the wetland or enhance the remaining wetland. Enhancement is described as dredging and planting of diverse plant species in order to improve the quality of the wetland. The record shows enhancement would serve to improve water quality and increase the diversity of plant life, wildlife in the area and the aesthetics of the parcel. (Testimony of R. Leighton, 10/28/97, pgs. 395-399). Under the facts in this case, the proposed enhancement constitutes mitigation.

The Proposal for Decision found that of the three alternatives, the one containing enhancement is a feasible and prudent alternative to the other two. This finding is supported by the record, but the activity will cause an unavoidable impact on the wetland. The next step is to determine if sufficient and practical steps have been taken to minimize the impact. The record supports the finding that enhancement, as opposed to

off site mitigation, is the practical method for minimizing the proposed project's impact. The Department's contention that the Petitioner could, in the metropolitan area, obtain a land-locked parcel, a small parcel, or a contaminated parcel for mitigation is without merit. Given this, off-site mitigation is impractical and due to the scope of the activity and the configuration of the parcel, on-site mitigation is limited to the enhancement of the remaining wetland. The enhancement will, according to the record, improve the benefits derived from the existing wetland. Therefore, enhancement serves to significantly lessen the impairment to the wetland and mitigate the impact of the proposed activity. .

The Department contends subsection (d) of Rule 5 supports the imposition of its "general rule", which was covered in great detail during the hearing, that mitigation is typically required at a ratio of 1.5 acres of wetland created for every acre of wetland impacted. However, the language of subsection (d) states " . . . there must be no net loss of wetland resources." (Emphasis added) . According to the record in this case, little if any of the wetland resources enumerated in §30302 (b) are currently being provided by the wetland. It then follows that the enhancement of the wetland will not diminish those resources, but rather they will be improved upon. Thus the Department's position is not supported by Rule 5, regardless of the length of time it has been utilized or the number of applicants who have agreed to the ratio. Every permit -application must be reviewed on its merits, just as every mitigation proposal must be reviewed in the context of the permit application and facts of that particular situation. The ratio may vary depending on the facts and there is no

basis upon which to imply Rule 5 requires a 1.5 to 1 ratio.

In this case, the Petitioners have proposed mitigation which will serve to improve existing wetland benefits, which are currently minimal, to offset the loss of the resource due to the proposed activity. Under the permitting criteria of Part. 303 the proposed activity will result in an unavoidable impact, to which a feasible and prudent alternative does not exist. Pursuant to subsection 4 of Rule 5, no feasible and prudent alternatives which would avoid the loss of the resource have been found to be practical. Therefore, the finding that the on-site enhancement is practical, while off-site mitigation is not, is proper.

Exception 5

The Department contends the U.S. Fish and Wildlife Service's opposition to the proposed activity is sufficient cause to reject the Proposal for Decision. This Exception must fail for two reasons. First, the Department's proofs regarding the activity's impact on wildlife was addressed In the Proposal for Decision. Second, this argument, in the context of whether the Petitioner is entitled to a permit under Part 303, is without merit.

Exception 8.

This Exception raises the significant legal point regarding wetland dependency. The Department argues only activity that must be performed in wetland meets the wetland dependency test. Conversely, every other permittable activity is not wetland dependent and

must, therefore be conducted on upland.

Section 30311 (4) reads

(4) A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether a disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following :

(a) The proposed activity is primarily dependent upon being located in the wetland.

(b) A feasible and prudent alternative does not exist.

The operative term in 4(a) is "being located in the wetland". The plain and unambiguous meaning of this term is whether the activity must extend into the portion of the parcel which is wetland. If the entire parcel is wetland, the activity must occur in it so as to allow a use of the parcel. If, as in this case, the existing upland is not large enough to accommodate the feasible and prudent alternative, impact on the wetland is unavoidable. The Proposal for Decision found, and the record supports, the proposal of 112 Units with enhancement is a feasible and prudent alternative to the Department's proposal of a project with less impact in the wetland. Therefore, the proposed activity is primarily dependent in being located in the wetland.

The Department asserts the foregoing analysis is inconsistent with its staff's interpretation and application of the wetland dependent provision. While

deference is accorded the staff's position in that they are responsible for the day-to-day administration of Part 303, greater deference is given to the clear language of the statute and prior interpretations of the language by this Tribunal. Appeal of Robert C. Brammer, Sr. , File Nos. 88-6-500 & 90-6-159W. To do otherwise would lead to a result which is inconsistent with the law. Based on the foregoing, the Finding of Fact in the Proposal for Decision that the project is wetland dependent is proper.

The purpose of this Final and Determination and order is to determine if the Proposal for Decision should be accepted. In reviewing the evidence, including the hearing transcripts, the ALJ's finding that a 112 unit development with on-site wetland enhancement is consistent with the permitting criteria enunciated in Part 303 is proper. Therefore, the Chief Administrative Law Judge of the Office of Administrative Hearings ADOPTS AND INCORPORATES BY REFERENCE the Proposal For Decision dated August 12, 1998, including the Findings of Fact and Conclusions of Law. THEREFORE; IT IS ORDERED:

1. The Proposal For Decision dated August 12, 1998, is adopted by reference and incorporated into this Final Determination and order.

2. The application for a permit for File No. 93-14-502 is DENIED.

3. A permit shall be issued consistent with the proposed activity set forth in Exhibit P-79 and this Final Order and Determination.

4. The Office of Administrative Hearings does not

retain jurisdiction in this matter

Dated: September 30, 1998

Richard G. Lacasse, Chief Administrative Law Judge
Office of Administrative Hearings

Lake St. Clair Advisory Committee

P.O. Box 272, Mt. Clemens, MI 48040

January 17, 2000
Walter A. Gauthier
Permit Evaluation Section B
Corps of Engineers
P.O. Box 1027
Detroit, Michigan 48231

Mr. Gauthier

In reference to JPN permit alication#99-250-002-1 by Keith and June Carabell, the applicants do not provide for adequate mitigation for the lose of the wetland. Although mitigation of wetland is still an imperfect science, duplicating a forested wetland makes the task of mitigation much more complex if not impossible. This is truly a unique piece of property within the borders of Chesterfield Township. Although the recent seasons have left this site somewhat dry, the property as the ability to store, filter, and recharge the ground water.

The Administrative Law Judge's decision to overrule the MOEO appeared to be based on housing needs of the area and providing the applicants with a profit on a speculative venture. The applicants four witnesses included land and real estate consultants plus a judge's report also mentions that the area is fully developed and, therefore, there is virtually no remaining wetland. Does this mean that a wetland in this area is of no value for the community? Furthermore, the report views the forested wetland as unproductive and could be replaced

with a man-made/enhanced wetland.

The Lake St. Clair Advisory Committee stands by its decision made in 1993 to request that the application be denied.

Respectfully,
Donald Gunning, Chairman
Lake St. Clair Advisory Committee

Cc: MUCC Wetlands Watch
Elaine Fischoff, Asst. Attorney General
Mark Richardson, Asst. Macomb Co. Prosecutor

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 0 7 2000

LTC Robert J. Davis,
District Engineer
U.S. Army Corps of Engineers,
Detroit District
P.O. Box 1027
Detroit, Michigan 48231

Re: Joint Public Notice, File No: 99-250-002-1, Keith and June Carabell

Dear Colonel Davis:

The U.S. Environmental Protection Agency (EPA) reviewed the Public Notice issued by your office, in which Keith and June Carabell request your authorization to discharge approximately 57,500 cubic yards of fill into 15.87 acres of wetlands in Chesterfield Township, Macomb County, Michigan. The applicants propose to dredge and replant 3.74 acres of the remaining wetlands on the 19.61 acre parcel as compensatory mitigation for the proposed project, the purpose of which is, to construct a condominium, development.

In response to the Michigan Department of Environmental Quality's (MDEQ) Public Notice No. 93-14-602, EPA provided combined comments for itself

and the U.S. Fish and Wildlife Service (FWS) to the MDEQ, on March 4, 1994, objecting to the proposed project (copy enclosed). Our comments asserted that insufficient information was provided to determine compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines, based on the applicants failure to provide an adequate alternatives analysis, failure to minimize wetland impacts and proposal to create compensatory mitigation that was neither adequate nor in-kind. By order of an administrative law judge, the MDEQ issued the permit on November 13, 1998. EPA sustained Federal objections on November 23, 1998, effectively transferring permitting authority to you, pursuant to CWA Section 404(j) and 40 CFR Part 233.500).

We note that the proposal before you is essentially identical to that authorized by the MDEQ on November 13, 1998. As a result of the applicant's repeated failure to address the concerns raised by the Federal agencies in 1994, and the significant proposed impact to the Nation's wetland resources, EPA has no choice but to object to the current proposal. Insufficient information has been provided to determine compliance with the Clean Water Act Section 404(b)(1) Guidelines, therefore, EPA recommends that the proposed permit be denied unless the applicant provides an adequate alternatives analysis, demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable, and provides an acceptable mitigation plan to construct in-kind wetland mitigation at a minimum ratio of 1.5:1.

Thank you for the opportunity to provide comments on this proposal. Please address any questions to Gerald

D. Winn of my staff at (312) 886-2777.

Sincerely,
Jo Lynn Traub
Director, Water Division Enclosure

cc: Bob Deroche, Corps of Engineers, Detroit District
Jenny Wilson, FWS East Lansing.

United States Department of the Interior
FISH AND WILDLIFE SERVICE
East Lansing Field Office (ES)
2631 Coolidge Road
East Lansing, Michigan 48823

March 8, 2000

Walter A. Gauthier, Chief
Permit Evaluation Section E
Regulatory Branch
U.S. Army Corps of Engineers
P.O. Box 1027
Detroit, MI 48231

Re: Corps File No. 99-250-002-1, applicant Keith and June Carabell

Dear Mr. Gauthier:

We have reviewed the above referenced joint public notice to authorize the placement of fill materials in wetlands. The proposed project is in section 21, T3N, R14E, Chesterfield Township, Macomb County; Michigan. These comments are prepared under the authority of the Fish and Wildlife Coordination Act and the Endangered Species Act of 1973 (Act), as amended. They are also consistent with the Service Mitigation Policy,

The applicant proposes to discharge approximately 57,500 cubic yards of material within a 15.81 acre wetland area for construction of a 112 unit townhouse condominium complex on a 19.61 acre parcel. The applicant also proposes to dredge and replant 3.74 acres

of the remaining wetlands on the parcel as Mitigation for the project.

Fish and Wildlife Coordination Act Comments.

General Comments

We are opposed to the development of non-water dependent facilities, such as condominiums, in wetlands when fish and wildlife resources would be adversed impacted and alternatives are available. Wetlands in a suburban location, such as the ones present on the project site, are becoming increasingly scarce and provide refuge for both resident and migratory wildlife in this area.

The plans for this project do not appear to be substantively different from project we reviews or this site under the state File Na 93-14-602W. As we stated previously, the site contain palustrine forested wetlands throughout the project area. These wetlands serve as valuable habitat for songbirds, raptors, small mammals, amphibian, reptiles, and aquatic and terrestrial invertebrates by providing food, water, cover from predators, and shelter during severe weather. In addition these wetlands likely retain and filter surface water runoff, thereby reducing downstream flown during storm events in the adjacent streams and improving water quality in adjacent water bodies.

SPECIFIC COMMENTS

Potential Project Impacts
The applicant's proposal would directly impact

approximately 15.97 acres of forested wetland through filling for the proposed condominium development and an additional 3.74 acres by dredging for the mitigation project. While some species of wildlife may be able to tolerate habitat provided by the proposed condominium development, the proposed wetland filling and concomitant tree removal would displace or destroy animal species associated with the up lands and wetlands to be impacted by this project. In addition, the proposed project would create large areas of impermaeable surfaces on the site. Runoff from these areas would likely contain contaminants such as oil and grease from parking lots and fertilizers or pesticides from landscaping activities. runoff, if not adequately addressed, may become a contaminants source to, the remaining wetlands on the site and potentially to waters downstream, including Lake St. Clair, as the runoff passes off the property by means of the adjacent drain.

Alternative Analysis

Significant wetland losses have taken place in Michigan since the early 1800s. The wetlands that remain continue to be lost incrementally through draining and filling for various purposes throughout the state. Forested wetlands are of particular concern since, once altered, they may take decades to regenerate or may not return at all. Macomb County has lost approximately 71% of the acreage of mixed hardwood wetlands once present and has lost 73% of overall wetland acreage county-wide (Comer 1996).

In light of the magnitude of these losses, we recommend you rigorously explore with the applicant,

less environmentally damaging alternatives to the project as currently proposed. It does not appear the applicant has considered alternate, non-wetland sites for the proposed non-water dependant activities. In addition, it does not appear wetland impacts have been avoided on-site to the maximum extent practicable. We recommend exploring upland development, on or off-site, and reconfigurations of buildings and associated infrastructure on-site as means to further avoid or minimize wetland impacts.

Adequacy of Proposed Mitigation

We understand the applicant has proposed to dredge and replant 3.74 acres of the remaining wetlands on the parcel as mitigation for project impacts. We submit that this proposal would not replace the functions and values of the 15.87 acres of forested wetlands lost as a result of the proposed project. In addition, we contend that the applicant's proposal to excavate existing wetlands would merely exchange one wetland type for another (i.e., exchange forested with emergent or open water habitat thus exacerbating the loss of forested wetland functions and values in this area.

We recommend, if you determine that wetland impacts on the project site are in the public interest and an alternatives analysis clearly shows that those impacts have been avoided and minimized to the maximum practicable extent, that you require the applicant to provide for agency consideration in advance, a detailed mitigation plan that meaningfully replaces lost wetland function and values. In addition, we normally recommend exhausting all opportunities for on-site, in-kind (i.e., forested) replacement of wetland functions

and values before considering off-site or out-of-kind opportunities for compensatory mitigation, Since this site in already wetland, we continue to recommend in-kind replacement of any authorized wet land impacts, however, we recommend locating replacement wetlands within the watershed and in as-close proximity to the affected wetlands as possible but off-site to avoid additional impacts to on-site wetlands.

Finally, we recommend that any mitigation proposal provided for consideration include:

o A commitment to replace the lost functions and values of-any impacted wetlands. (We generally recommend an acreage replacement ratio of a minimum of two acres replaced, for each one acre impacted for forested wetlands, although this ratio varies if the mite anon is out-of-kind or not on-site or in close proximity to the impacted wetlands.)

o The detailed identification and characterization (type, size, dominant vegetation, soil type, etc.) of all wetlands located in the area of the proposed project.

o The identification of resident and migratory fish and wildlife resources occurring or reproducing in the affected area of the proposed project.

o The exact location of mitigation sites and the identification of soil types in these areas sites to be created restored, enhanced or preserved should be clearly labeled and a map showing the locations and boundaries should be included with the proposal.

o A plan to control the establishment of undesirable

exotic and invasive plant species such as purple loosestrife (Lythrum salicaria), common buckthorn (Rhamnus cathartica), and reed grass (phragmites australis).

o A plan, with performance criteria, to monitor the progress of the wetland habitat mitigation following construction for a minimum period of five years. The plan should include a sampling protocol and a timetable for the habitat monitoring that includes the time of year and the frequency of sampling. Annual monitoring reports should be submitted. Termination of monitoring after the appropriate time period would be contingent upon Corps of Engineers concurrence that the wetland mitigation site exhibits a strong likelihood of successful replacement of the impacted wetland habitat's functions and values.

o A plan to implement appropriate measures for correcting or improving the biological productivity of the wetland mitigation habitats for the duration of the monitoring period in the event that performance criteria are not met. This would include planting desirable hydrophytic vegetation, controlling exotic and invasive plant species, and implementing other measures, as necessary, to achieve successful mitigation.

o The development of procedures to protect, in perpetuity, any wetland habitat remaining on the project site and the compensatory wetland mitigation areas by a conservation easement recorded as a deed restriction.

Endangered Species Act Comments:

Information in our files indicates the endangered Indiana bat (Myotis sodalis) may occur in the project area. Indiana bat is listed as endangered pursuant to the Act. It is also protected by the Michigan Department of Natural Resources (MDNR) through Part 365, Endangered Species Protection of the Natural Resources and Environmental Protection Act, 1994, PA 451. Please contact Lori Sargent of the MDNR at (517) 373-1263 with questions concerning the protection of threatened and endangered species under state law.

Summering Indiana bats roost in trees in riparian, bottomland, and upland forests. Roost trees generally have exfoliating bark which allows the bat to roost between the bark and bole of the tree. Cavities and crevices in trees are also used for roosting. A variety of tree species are known to be used for roosts. Structure (i.e. Crevices or exfoliating bark) is probably more important than the species of tree in determining if a tree is a suitable roost site.

Male bats disperse throughout the range and roost individually or in small groups. In contrast, reproductive females form larger groups, referred to as maternity colonies. Female Indiana bats exhibit strong site fidelity to summer roosting and foraging areas, that is, they return to the same summer Range annually to bear their young. Traditional summer sites are essential to the reproductive success of local populations.

Indiana bat maternity sites generally consist of one-or more primary maternity roost trees which are used repeatedly by large numbers of bats, and varying

numbers of alternate roosts, which may be used less frequently and by smaller numbers of bats (Kurta et al. 1993). Bats move among roosts within a season and when a particular roost becomes unavailable from one year to the next. It is not known how many alternate roosts must be available to assure retention of a colony within a particular area, but large, nearby forest tracts appear important (Callahan 1993). In addition to having exfoliating bark, roost trees must be of sufficient diameter. Trees in excess of 16 inch diameter at breast height (dbh) are considered optimal for maternity colony roost sites, but trees in excess of 9 inch dbh appear to provide suitable maternity roosting habitat (Romme et al. 1995). Male Indiana bat have been observed roosting in trees as small as 3 inch dbh.

As required by Section 7 of the Act and its implementing regulations, you must determine whether issuance of a permit for the proposed activities may affect species listed as threatened or endangered pursuant to the Act. If issuance of a permit may affect a listed species, you must consult with our East Lansing Field Office. Enclosure A briefly describes a federal agency's basic responsibilities and requirements under the Act.

We recommend, at a minimum, a qualified individual survey the project site for the presence of suitable Indiana bat habitat. If the survey determines that suitable habitat in present on-site, we recommend you do not issue a permit for the proposed project or any other project that may affect wetlands on this site until you ensure protection of the bats and have concluded consultation with this office.

Summary Comments:

We recommend you do not issue a Department of the Army permit for the project as proposed until our endangered species and wetland concern are removed. The applicant has not clearly demonstrated that less environmentally damaging, or upland alternatives are unavailable. We further recommend a complete alternatives analysis and meaningful wetlands mitigation plan be prepared and provided for review if continued consideration is accorded this or any modified proposal that would affect these wetlands. Finally, we recommend you consult with our East Lansing Field office regarding the potential effects of the proposed project on Indiana bat if suitable habitat is present on-site.

We appreciate the opportunity to provide our resource protection recommendations. If you have questions, please contact Jenny Wilson of this office at 517-351-6326 or the above address.

Sincerely.

Craig A. Czarnecki
Field Supervisor

CC: Michigan Department of Environmental Quality, Land & Water Management Division, Livonia, MI (Attn: Mike Nurse)
Michigan Department of Natural Resources, Wildlife Division, Lansing, MI (Attn. Lori Sargent)

Literature Cited

Callahan, E.V., III. 1993. Indiana bat summer habitat requirements. M.S. Thesis. University of Missouri Columbia. 84 pp.

Comer, P.J. 1996. Wetland Trends in Michigan Since 1800: a preliminary assessment. Report to the U.S. Environmental Protection Agency, Water Division, and the Land and Water Management Division, Michigan Department of Environmental Quality. Michigan. Natural Features Inventory, Lansing, MI. 76pp.

Kurta, A., D. King, J.A. Teramino, J.M. Stribley and K.J, Williams. 1993. Summer roosts of the endangered Indiana bat (Myotis sodalis) on the northern edge of its range. Am. Midl. Nat. 129:132-138.

Romme, R. C. , K. Tyrell, and V. Brack, Jr. 1995. Literature summary and habitat suitability index model: components of summer habitat for the Indiana bat (Myotis sodalis). Report to Indiana Department of Natural Resources, Federal Aid Project E-1-7, Study No, 8, 38pp.

FEDERAL AGENCIES' RESPONSIBILITIES UNDER SECTION 7(a) AND 7 (c) OF THE ENDANGERED SPECIES ACT

SECTION 7 (a) – Consultation/Conference

Requires:

1. Federal agencies to utilize their authorities to carry out programs to conserve endangered and threatened species;

2. Consultation with U.S. Fish & Wildlife Service (Service) when a federal action may affect a listed endangered or threatened species to ensure that any action authorized, funded, or carried out by a federal agency is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The process is initiated by the federal agency after they have determined if their action may affect (adversely or beneficially) a listed species: and

3. Conference with Service when a federal action is likely to jeopardize the continued existence of a proposed species or result in destruction or a adverse modification of proposed critical habitat.

SECTION 7 (c) – Biological Assessment for Major Construction Projects[1]

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[1] "Major Construction project" means any major federal action which significantly affects the quality of the human environment as referred to in NEPA (requiring an EIS) designed primarily to result in the building or

Requires federal agencies or their designees to prepare a Biological Assessment (BA) for major construction projects. The purpose of the BA is to identify any proposed and/or listed species which is/are likely to be affected by a construction project. The process is initiated by a federal agency in requesting a list of proposed and listed threatened and endangered species. The BA should be completed within 180 days after its initiation (or within such a time period as is mutually agreeable). If the BA is not initiated within 90 days of receipt of the species list, please verify the accuracy of the list with the Service. Sec. 7(d) states agencies shall not make any irreversible or irretrievable commitment of resources during the consultation process which would result in violation of the requirements under Section 7 (a) (2). Planning, design, and administrative actions may be taken; however, no construction may begin.

To complete the BA, your agency or its designee should (1) conduct an onsite inspection of the area to be affected by the proposal which may include a detailed survey of the area to determine if the species is present and whether suitable habitat exists for either expanding the existing population or potential reintroduction of the species (2) review literature and scientific data to determine species distribution, habitat needs, and other biological requirements; (3) interview

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erection of man-made structures such as dams, buildings, roads, pipelines, channels, and the like. This includes federal actions such as permits, grants, licenses, or other forms of federal authorization or approval which may result in construction.

experts including those within the Service, state conservation departments, universities, and others who may have data not yet published in scientific literature; (4) review and analyze the effects of the proposal on the species in terms of individuals and populations, including consideration of cumulative effects of the proposal on the species and its habitat; (5) analyze alternative actions that may provide conservation measures; and (6) prepare a report documenting the results, including a discussion of study methods used, any problems encountered, and other relevant information. Upon completion, the report should be forwarded to; Field Supervisor, U.S. Fish & Wildlife Service, 2651 Coolidge Rd., East Lansing, MI 48823-6316.

March 14, 2000

Walter A. Gauthier
Permit Evaluation Section B
Corps of Engineers
P.O. Box 1027
Detroit, MI 48231

Re: Comments on Permit Application File No. 99-250-002-1 Discharge of Fill Material in Wetlands, Chesterfield
Township MI

Dear Mr. Gauthier:

These comments are submitted on behalf of the Walter Quality Unit of the Macomb County Prosecutor's Office. The Water Quality Unit is responsible for civil and criminal enforcement of environmental and public health statutes and ordinances in Macomb County by resolution of the Macomb County Board of Commissioners.

Keith and June Carabell are seeking a permit under Section 404 of the Clean Water Act to the Clean Water Act to fill a15.87 acre wetland area for construction of a 112 unit townhouse condominium development. The Carabells propose to dredge and replant 3.74 acres of wetland remaining wetlands on the parcel as mitigation for the project. The parcel is located southeast of the I-94 and M-29 interchange east of Donner Road in Chesterfield Township, Macomb County Michigan.

The approximately 16 acres of wetland which would be filled by the proposed project and the approximately 4

acres mitigation area are high quality palustrine forested wetland characterized by a rich diversity of plant and animal life. In effect, the applicant proposes to eliminate over 19 acres of forested wetland area and replace it with 4 acres of less-valuable emergent wetland. This simply cannot be permitted under Section 404. The loss of this high quality wetland area would have an unacceptable adverse effect on wildlife, water quality, and conservation of wetlands resources.

This parcel is one of the last remaining sizable areas of forested wetland in Chesterfield Township. For this reason alone, its destruction would have a devastating impact on wildlife habitat in the area. Runoff from the condominium development would further degrade surface water resources in the area. These detrimental impacts completely outweigh any conceivable benefits which might be derived from the project. In addtion, the applicant has not shown that the project is wetland-dependent; that alternatives to the westland site are not available; or that mitigation measures adequate to compensate for the loss of this wetland cannot be accomplished.

The Water Quality Unit of the Macomb County Prosectuor's Office respectully request that the permit application be denied.

Sincerely,

Mark A. Richardson
Assistant Macomb County
Prosecuting Attorney For Water Quality

CC: Carl J. Malinga

Donald Gunning

CELRE-ET-RG 99-250-002-1

May 5, 2000

MEMORANDUM TO: File

SUBJECT: INSPECTION REPORT of CARABELL CONDOS

Inspection Date: 05-May-2000
Authority: 404
Jurisdiction (State transferred Section 404 water);
Noncompliance N/A
Unauthorized Work N/A
Photographs NO
Application for Work Yes
Work in Progress. NO
Remedial Action NIA

APPLICANT (Owner):
Carabell, Keith and June
c/o Tim Stoepker, Abbot
300 River Place, Suite 3000
Detroit, MI 48207
Work: (313) 566-2500
Home:

LOCATION:
Address: Donner Road
City: Chesterfield Township
County: Macomb
State: Ml
Sec: 21
Twp:3N
Rge:14E

JURISDICTION:
Waterway: in wetlands adjacent to
First Section 10 Waterway: Lake St. Clair
Navigable: N Wetland: Y Above: Headwaters: N

Waterward of OHWM: No
Potential to influence course, condition, capacity of Section 10 waters: Yes
Designated Wetland on Quad, NWI dr Soil Survey: Yes
Wetland adjacent to other waters: No
(Complete Adjacency Section)
Tributary to navigable water: No

INVESTIGATOR'S SUMMARY (descriptions of work including equipment, conversation summaries, observed/predicted impacts of work, any necessary remedial or corrective action, need to take discretionary authority): Purpose of the visit was to determine if the site supports interstate commerce. Project manager Bob Deroche was accompanied to the site by Dr. Tom Allenson of the Detroit District staff. Dr. Allenson is considered the district's most knowledgeable bird men. Many species of neo-tropical migrants, as well as other migratory birds were identified by sight and/or call. It was determined that the site does support interstate commerce. See attached bird listing.

DETERMINATION OF ADJACENCY

Hydrological connection(s) with waterway: Site is approximately 1.2 miles (straight distance) from Lake St. Clair, however, Sutherland-Cemig Drain runs adjacent to the site. The Drain flows continuously and flows into Auvase Creek which flows into Lake St.

Clair Wetland's elevation above waterway: According to software "Terrain Professional", the site is approximately 5 feet above the mean Lake St. Clair elevation.

INSPECTOR: DEROCHE

Detroit District
U.S. Army Corps of Engineers

File Number 99-250-002-1

Department of the Army Permit Evaluation
CARABELL CONDOS

This document constitutes my Environmental Assessment, Public Interest review summary, and, if applicable, my factual and compliance determination according to the 404 (b) (1) Guidelines for the work proposed for permit. It was prepared from a generic master document that facilitated consideration of the range of all possible impacts from projects within the purview of the Regulatory Program of the Army Corps of Engineers, in accordance with 33 CFR Part 320 33 CFR Part 325 Appendixes B and C, and 40 CFR Part 230.

I. Application Processing

A. Name of Applicant: Keith and June Carabell, Detroit, MI.
Attorney/Agent for Applicant: Mr. Timothy A. Stoepker, Law Offices of Abbott, Nicholson, Quilter, Esshaki, & Youngblood, 300 River Place, Suite 300, Detroit, Michigan 48207-4225.

Environmental Consultant: Robert Leighton Associates, 167 Little Lake Drive, Ann Arbor, Michigan 48103.

B. Work Description: The most recent plans showing the proposed work are attached (Encl. 1.). The

applicant proposes to discharge approximately 57,500 cubic yards of material within a 15.97 acre wetland area for construction of a 112-unit townhouse condominium development. As mitigation, the applicant proposes to dredge and replant 3.74 acres of the remaining wetlands on the parcel.

The applicant originally applied to Michigan Department of Environmental Quality (MBEQ) for a permit to discharge fill material on the subject property for construction of a 200-unit condominium complex. That application was denied in 1987 and the denial upheld in Michigan Court of Appeals. The current application was submitted to MDEQ in 1993 for an alternate plan that would result in a 130-unit condominium complex on the parcel. Again, this was denied by MDEQ in 1994. The denial was based on the findings that "the proposed activity would have a significant adverse impact on the natural resources, public interest and public trust held in the subject wetlands". They also cite lack of water dependency, lack of minimization, available upland alternatives, Environmental Protection Agency (EPA) and Department of the Interior, Fish and Wildlife Service (FWS) objections, and lack of mitigation for reasons for denial. A state contested case hearing was held in 1998 before Administrative Law Judge Richard A. Patterson who determined that a permit for a 112-unit alternative on the site should be issued. The MDEQ permit was issued in November of 1998 as directed by Judge Patterson. The permit was issued over outstanding EPA objections; therefore, the state permit does not fulfill requirements for a federal Section 404 permit under the Clean Water Act.

C. Purpose: The applicant's stated purpose for the work is preparation of a private lot for construction of a condominium complex. Our interpretation of the project purpose relevant to alternatives in NEPA Regulations (Appendix B, 7.) and Regulations at 320.4(a) (2) (ii), relevant to necessity in the context of 320.4(b) (1), and as defined in the 404(b) (i) Guidelines and subsequent guidance as "overall project purpose" is to construct a large multi-family condominium development within the Macomb or St. Clair County, Michigan area.

D. This application for a Department of the Army permit is being reviewed under authority delegated to the District Engineer by the Secretary of the Army and the Chief of Engineers by Title 33, Code of Federal Regulations, Part 325.8, pursuant to Section 404 of the Clean Water Act.

E. Public Involvement: A list of the agencies, interested groups, and the public consulted regarding the project is attached to the Public Notice dated February 8, 2000 which expired on March 9, 2000 (Encl. 1).

F. Federal, State, Local, and Public Comments Relating to the Activity:

1. Federal:

a. U.S. Environmental Protection Agency (EPA) : The EPA responded by letter dated March 7, 2000. They object to issuance of a federal permit unless the applicant provides an adequate alternatives analysis, demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable, and provides and acceptable mitigation plan to construct in-

kind wetland mitigation at a minimum ratio of 1.5:1 (EPA, Encl. 2). The EPA cites "the significant proposed impact to the Nation's wetland resources", as a reason for objecting to issuance of a permit, as well.

b. U.S. Fish and Wildlife Service (FWS): The FWS responded by letter dated March 14, 2000. They object to issuance of a federal permit because fish and wildlife resources would be adversely impacted through elimination or alternation of habitat and potential contamination of water due to runoff from the large areas of impermeable surfaces on the site. FWS states that Macomb County has lost 71% of its historical acreage of mixed hardwood wetlands and 73% of overall wetland acreage that were at one time present and that wetlands in suburban locations are becoming increasingly scarce. These wetlands are important because they provide refuge for both resident and migratory wildlife in this area. In addition, they express concerns over the potential project impacts to the federally-listed as endangered Indiana Bat (Myotis sodalis). They recommend a survey of the project site for the presence of suitable Indiana Bat habitat, as well as a wetland mitigation plan for their review should the Corps of Engineers proceed with consideration of this or any modified proposal that would affect the wetlands on the parcel (FWS, Encl. 3).

FWS points out that the proposed wetland filling and tree removal would displace or destroy animal species associated with uplands and wetlands. They submit that the proposed mitigation would not replace the many lost functions and values, but would merely exchange one wetland type for another, exacerbating the loss of forested wetland functions and values in the

area. The Service requests the opportunity to review any mitigation plan submitted, should the Corps determine that issuance of a permit is not contrary to the public interest.

c. Congressional: No interest was expressed by any member of Congress.

2. State:

a. Michigan Department of Environmental Quality (MDEQ) denied the original permit application on February 22, 1994 (MDEQ, Encl. 4). The proposal requested a permit for fill in 15.96 acres of wetlands for the construction of 130 condominium units on the parcel. As a result of a Contested Case Hearing with MDEQ, a Final Determination and Order was issued on September 30, 1998 (MDEQ, Encl.5). The Order resulted in issuance of an MDEQ permit on November 13, 1998 for the proposal currently being reviewed for a DA permit (MDEQ, Encl. 6). We, therefore, presume that the project is consistent with the Coastal Zone Management Act and that Section 401Water Quality Certification is issued or waived.

b. State Historic Preservation Officer (SHPO) : SHPO submitted a letter dated June 7, 2000 stating that no historic properties are affected within the area of potential effects of this undertaking (SHPO, Encl. 7).

3. Local : One letter was received from Mark A. Richardson, assistant Macomb County Prosecuting Attorney for Water Quality, on behalf of Macomb County requesting the permit for the proposed work be denied (MCPA, Encl. 8). The letter states that the

destruction of one of the last remaining sizeable forested wetland areas in Chesterfield Township would have a devastating impact on wildlife habitat in the area and that runoff from the condominium development would further degrade surface water resources in the area. He states the applicant has not shown that the project is wetland-dependent; that alternatives to the wetland site are not available; or that mitigation measures adequate to compensate for the loss of this wetland cannot be accomplished.

The City of Detroit Water and Sewerage Department submitted a letter stating there is no apparent conflict with any department utilities (DWSD, Encl. 9).

4. Public: We received an objection letter from Mr. Donald Gunning on behalf of the Lake St. Clair Advisory Committee dated January 17, 2000 requesting the permit application be denied (LSAC, Encl. 10). The objector states that the forested wetland has the ability to store, filter, and recharge the groundwater and questions the administrative law judge's report on the value of the remaining few wetlands within the Township.

G. The applicant was furnished copies of all timely objections, by letter dated March 20, 2000 and was afforded the opportunity to resolve/rebut them. We also directed the applicant to specifically provide a survey for the existence of the federally-listed as endangered Indiana Bat (Myotis sodalis) and of suitable habitat for the species and to provide their analysis of available alternatives to filling in this forested wetland (Encl. 11).

The applicant's attorney responded to the objections/request by letters dated March 28, 2000 and May 23, 2000 (Encls. 12&13, respectively). Main points of the rebuttal were:

i) The FWS previously responded to MDEQ's public notice with a letter dated January 14, 1994 stating there were no listed species within the project area. The project consultant walked the property on numerous occasions and has not seen the Indiana Bat. In addition, there are no laws, regarding wetland regulations. These materials, as well as other alternative arguments discussed in the court sessions have been provided (Encl. 14).

ii) The feasibility materials were provided in the Administrative Law trial and establish compliance with applicable statutes and regulations. These materials, as well as other alternative arguments discussed in the court sessions have been provided (Encl. 14).

II. Environmental Setting:

A. Description of the Area: Lake St. Clair is part of the Great Lakes drainage system, lying between the St. Clair and the Detroit Rivers. The Lake is bounded by S.E. Michigan and the province of Ontario area land use is primarily residential with agriculture prevailing to the north and heavy industry nearby in the Detroit Metropolitan area. This proximity to the Detroit population center, coupled with abundant water-based recreational opportunities afforded by Lake St. Clair and connecting waterways, generates a great demand for marinas, and waterfront and canal developments. Macomb County has experienced a population increase

of 3.3% from 1980 to 1990 (694,6000 to 717,400), while Chesterfield Township experienced a 43.3 % increase (18,232 to 25,905) during the same period.

At the time of the glacial retreats, Lake St. Clair extended well inland from its current location, thereby rendering a large portion of Macomb and St. Clair Counties as lake bottom. This accounts for the large expanses with little topographical relief in the county. As the shoreline receded to its current location, minor beach ridges remained behind which were many wetland pockets. Most of these pockets drain towards the any arms of the lake which extend up to many miles inland.

B. Waterway Characteristics: Shorelines in the area are, for the most part, armored with the exception being a fairly large wetland area located approximately 7 miles away near the mouth of the Clinton River. The Clinton River is the largest river flowing through the County with a drainage area of about 734 square miles. Its average flow is 523 cfs and the maximum-recorded discharge was 21,000 cfs. The Belle and Salt Rivers along with Black and Swan Creeks contribute to the area's drainage but possess considerably smaller drainage areas than the Clinton River. Water levels in Lake St. Clair can fluctuate up to five feet over a long-term basis, causing significant shoaling problems during low levels, and high flood damages during high levels. Water quality is considered fair and safe for body contact during most times of the year. Combined sewage/storm water outfalls, particularly from the Clinton River, tend to discharge contamination into the lake after storm events causing officials to close the public swimming beaches due to high coliform courts.

C. Project Area: The project site is located approximately one mile from the shoreline of Lake St. Clair proper. The property is a 19.61 acre triangular shaped parcel containing mostly forested wetland. A ditch has been excavated along the southeast portion of the property (the hypotenuse of the triangle) that runs into the Sutherland-Oemig Drain, which empties into Auvase Creek, which then empties into Lake St. Clair. A total of three site inspections have been performed on the property. The first on October 12, 1999 for permit evaluation purposes; the second on May 5, 2000 for migratory bird use documentation; and the third on August 1, 2000 to determine if the area contained Indiana Bat habitat (Encls. 15, 16, 17, respectively). Due to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well.

1. Cultural Characteristics: Presently, there are no structures on the site. The site is bordered by Donner Road to the west, beyond which is a large residential subdivision between the site and Interstate 94; a vacant field to the north, beyond which lie several condominium and apartment complexes between the site and 23 Mile Road; a residential subdivision to the south continuing on to Lake St. Clair; and a vacant woodlot to the east, beyond which lie several residential subdivisions and then a large woodlot, slated for development into a residential subdivision.

2. Physical/Chemical Characteristics: There is no evidence of any existing erosion problem/flood damage

at the site, although there is evidence of ponding, i.e., watermarks on trees, and water stained leaves on the forest floor. Wetlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area. Spoils from the ditch were side cast, creating a dike which serves to block immediate drainage out of the parcel and holding water until its is quite high. By holding the water which falls onto the approximately 20 acre site and preventing it from immediately entering the surface water system, flood peaks to downstream areas are reduced.

Soils within the proposed work area consist of very friable clay loam at the surface beneath which are primarily clay soils.

3. Biological characteristics:

a. The Existing/Long term Vegetation and Habitat values for each portion of the work site are as follows:

Upland portions of the property: Of the 19.61 acres on the parcel, less than four acres are designated upland. A small, 200' deep, triangular shaped area in both the southwest and northeast corners of the triangular shaped lot and an upland ridge between the two formed as a result of side casting from the excavation of the 1,8000' ditch alongside the southwest to northeast side of the lot represent the limit of the uplands. Running parallel and adjacent to this upland ridge is an overhead power line with utility poles. The utility corridor has been kept trimmed of trees so that only small woody and herbaceous vegetation remains. The area is heavily vegetated with deciduous shrubs, including different

species of berries, and wild grapevines. The uplands at either end of the lot are densely vegetated with shrubs, saplings and trees. These upland areas on site provide romping, resting, and feeding habitat for a large variety of mammals, resident and migratory passerine birds, raptors and game birds, as well as amphibians and reptiles. The area acts as a green space within an area that is heavily populated on three sides. White-tailed deer were seen running between the wetlands and uplands on this site during two of the site visits. The upland areas in two of the three corners of the parcel are not slated for any development and, in fact, are to remain in their natural state. It appears as though the upland adjacent to the ditch will be graded for landscaping purposes (see Encl. 1).

Wetland portions of the property: The wetlands located on the parcel are forested and likely provide for wildlife diversity/abundance and aquatic diversity/abundance due to the fact that there is evidence of ponding for long periods of time, it is a large parcel relatively void of human disturbance, and it is in the middle of an area where most surrounding uplands and wetlands have been farmed and/or filled for residential construction. The area shows evidence of ponding in large areas for long enough periods to stain leaves on the forest floor and to create watermarks on trees. There are large numbers of deadfall trees and many trees with buttressed trunks, a morphological adaptation for surviving in saturated soils. There is very little in the way of understory within the woodlot. Many migratory birds were noted within the wetland areas as well as whitetail deer and evidence of other small mammals, i.e., scat and tracks. The wetland provides excellent habitat for large and small mammals,

resident and migratory birds, and amphibians and reptiles.

Riparian portions of the property: There is a ditch, which, during one undocumented site visit, contained standing water. The ditch empties into Sutherland-Oemig Drain, which has flowing, water year round. The ditch has scrub/shrub vegetation running along both sides and provides excellent land/water transition zone for all wildlife. It appears as though the ditch itself will not be altered except that a connection between the enhanced areas will be installed thereby making it more likely to have standing water in the ditch for longer periods, or even permanently.

Shallow Bottom areas that are seasonally/permanently inundated: The wetlands show evidence of standing water for long periods of time. It is likely this occurs during the spring at snowmelt, and/or at other times of the year after storm events. There is much detritus in these areas, as well. The area provides good habitat for benthic organisms important in the aquatic, and terrestrial, food chain.

Water Column of inundated/ponding areas: The primary area proposed for work is not accessible by fish due to the upland ridge alongside the ditch. According to the watermarks on the trees, depth of standing water on the interior of the lot is up to two feet. It likely provides good habitat during times of ponding/inundation for aquatic organisms important in the aquatic food chain.

b. Ecological context of proposed work site: The woodlot is one of the few remaining wetlands, indeed

forested wetlands, within Chesterfield Township, in relative close proximity to Lake St. Clair. It is along an established migratory flyway and provides a necessary refuge/stopover point for many resident and migratory species. These stopover points are being pushed further and further from the open waters of Lake St. Clair through residential development pressures. At one time it is likely that the entire perimeter of Lake St. Clair resembled the subject property, however, timber harvesting and agriculture greatly reduced that area and now, residential development pressures, only a few large woodlots remain within Macomb County.

III. Environmental Impacts of the Proposed Action

A. Identified Physical Impacts

1. Effects on Water Quality

a. Construction Impacts:

The proposed construction will occur landward of the Ordinary High Water Mark of Lake St. Clair in Sutherland-Oemig Drain (S-O Drain). All project-associated excavated, graded, and filled areas would be subject to erosion into the drain along the NE to SW property line and into the S-O Drain, thereby causing negative impacts to water quality until the areas are stabilized. The proposed activities would cause minor temporary degradation of water quality. In order to minimize the detrimental construction impacts the permit could be conditioned to require use of silt curtains around the work area and adequate containment and stabilization measures for upland work and equipment use areas.

b. Operational Impacts:

The proposed work would destroy/adversely impact an area that retains rainfall and forest nutrients and would replace it with a new source area for runoff pollutants. Pollutants from this area may include lawn fertilizers, herbicides, pesticides, road salt, oil, and grease. These pollutants would then runoff directly into the waterway.

All of the wetlands on this parcel are slated for either development into residential housing, or excavation for a storm water detention basin, or excavation for Enhancement of the existing remaining wetlands as mitigation.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may serve to capture some of the pollutants found in the runoff since the storm water detention basin draining the new complex would empty into these areas.

We also note that due to the existence of the spoil berm along the drain and other surrounding features, this wetland has been obstructed from receiving runoff from surrounding areas and from circulation by flooding in the drain. The site still has a very high potential to provide runoff storage if these artificial barriers are removed. The proposed fill would permanently remove this potential.

Overall, the operation and use of the proposed activity would have a major, long term, negative impact on

water quality. The cumulative impacts of numerous such projects would be major and negative as the few remaining wetlands in the area are developed.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease water quality impacts; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a significant reduction in the area of fill to reduce those impacts to a minor level.

2. Shoreline Erosion and Accretion Effects:

The project would eliminate the potential ability of the wetland to act as a sediment catch basin. Increased runoff due to the filling of the wetlands and creation of impervious surfaces, i.e. condominiums, driveways, roads, etc., could increase erosion and/or sedimentation in the S-O Drain, Auvase Creek, and Lake St. Clair. The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex would empty into these significantly smaller areas, quickly overtopping them. These wetlands would then empty into the drain and most functions served by the existing forested wetlands would not be replaced. The project would contribute to increased runoff and would likely result in increased erosion and accretion along the drain and further downstream in Auvase Creek.

In summary, the project will have minor, long term, negative impacts on erosion/accretion. The cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in Chesterfield Township to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems.

The negative impacts would be avoided if the permit were denied. A modified permit which minimized the fill area and offset runoff detention may decrease impacts to downstream erosion/accretion; however, when taking into consideration the cumulative impacts of similar activities which have occurred in this watershed, such a modified permit would require a significant reduction in the area of fill to reduce those impacts to a minor level.

3. Effects on Flood Hazards and Floodplain Values:

The proposed project would aid in the prevention of flooding for the applicant and authorization of such a project would encourage the applicant to invest in a parcel that shows evidence of flooding/standing water conditions. Because there is limited acreage remaining in the Chesterfield Township area which provides for storm water storage and delayed release of these waters, it is likely that the downstream areas will see an increase in possible flooding magnitude and frequency. This is due to the fact that there will be a net increase in runoff since the parcel is not currently a part of the S-O Drain watershed. Construction of the project and similar projects could have detriments to downstream residents.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some storm water retention; however, the storm water detention basin proposed for the center of the complex is proposed to empty into these significantly smaller areas, which will quickly exceed their storage capacity. These wetlands would then empty into the drain and the functions of water storage (from precipitation) served by the existing forested wetlands to would not be replaced (See drawing Pages 4-8 of Enclosure 1).

In summary, the project will have minor, short term and long term, negative impacts on flood hazards and floodplain values. The cumulative impacts of numerous such projects would be major and negative. The negative impacts would be avoided if the permit were denied.

4. Effects on Navigation

No impacts would be expected.

5. Water Supply and Conservation

No impacts would be expected. There are no water intakes in the area likely to be affected, and we anticipate no impacts to any drinking water aquifer.

B. Identified Biotic Impacts

1. Effects on Aquatic Biota

For most of the year the wetlands on the site do not support standing water and hence do not normally have active aquatic biota. However, during the spring flooding, standing water can persist for weeks at a time, and opportunistic aquatic biota such as tadpoles, macroscopic crustaceans and other invertebrates, as well as an assortment of vegetative forms such as duckweed (Lemna sp.) may be present. The proposed activity would eliminate this habitat, and disrupt, isolate, and fragment adjoining mitigation areas that are not eliminated, thereby permanently destroying the associated aquatic vegetation and invertebrates in the filled areas, and isolating and stressing the ones in the mitigation habitat. Some short lived, opportunistic benthic communities that take advantage of standing flood waters in wooded areas to complete their life cycles, and sedentary life stages, and as well as the eggs of each would be directly buried or removed by the proposed activity.

The release of contaminants to the ecosystem due to both the construction activities and releases associated with the subsequent residential development may adversely affect aquatic biota in their various stages, including adult, juveniles, larvae, eggs, and dormant stages in the remaining adjacent mitigation area, the adjacent drain, the S-O Drain, and Auvase Creek.

The net result of the proposed discharges are replacement of increasingly rare seasonally flooded wooded aquatic habitat in the area by increasingly abundant residential development. This results in an overall decrease in aquatic biota diversity and productivity.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some habitat for aquatic biota; however, the organisms that repopulate these wetlands would likely not be the same as those destroyed or removed as a result of the project as the wetland habitat will be significantly changed.

In summary, the project will have minor, long term, negative impacts on the aquatic biota. The cumulative impacts of numerous such projects would result in major, long term, negative impacts to this type of aquatic biota, and is evident within Chesterfield Township that most areas that have been developed to the point that they no longer have any appreciable seasonally flooded wooded wetlands left, nor the aquatic biota community normally found associated with these areas.

The negative impacts would be avoided if the permit were denied. The negative impacts would be increasingly reduced if the scope of work was reduced and discharges in wooded wetlands avoided. Upland alternatives appear to be available in the area that would avoid discharges in wooded wetlands, and would avoid or minimize negative impacts to aquatic biota.

2. Effects on Terrestrial Biota

The project would eliminate and alter reproductive, foraging, and resting habitat for perching birds, woodpeckers, game birds, raptors, some waterfowl, and small and large mammals, as well as for reptiles, amphibians, and invertebrates, which are important in

the food chain. It is possible that these wooded wetlands also serve as a travel corridor and cover for some mammals and avian species between adjacent agricultural fields and wooded lots to the east of S-O Drain.

The upland ridge habitat along the drain and in the corners of the parcel is the only uplands on the parcel. During the wet time of the year when the site holds standing water, the ridge may be the preferred location for dens for burrowing animals.

A variety of organisms would be displaced from their habitat by impacts of the proposed construction and its resulting use. Those displaced organisms will not cause degradation of habitat values for those areas to which they will be driven. However, there is an extremely limited quantity of equivalent habitat in the area. The project site is one of the last remaining large wooded wetland parcels in Macomb County, let alone Chesterfield Township. The adjacent property to the east contains wooded lands, which may or may not be wetlands. This parcel is likely slated for development, as well. Wildlife may not be accommodated if driven from the project site to these last remaining areas.

Recolonization of the project area by similar species would not be expected to occur after construction. The natural habitat would no longer exist. The newly created landscaped upland would furnish habitat for those few species adapted for life under these conditions. At the fill borrow site, terrestrial plants and habitats would be destroyed by excavation operations. The net exchange of habitats that are increasingly rare in the area for habitats that are

abundant will result in an overall decrease in terrestrial biota diversity and productivity.

The proposed deforestation and removal of two to three feet of wetland soils to create an emergent wetland within the 3.74 acres of remaining existing forested wetlands (the proposed mitigation) may provide some habitat for terrestrial biota; however, the species that repopulate these wetlands would likely not be the same as those destroyed or removed as a result of the project as the habitat type will be significantly different.

In summary, the project will have major, long term, negative impacts on the terrestrial biota. The cumulative impacts of numerous such projects results would be a notable decrease in the quantity and quality of terrestrial wildlife. This may be observed in similar areas that have been extensively developed for residential and/or commercial use and no longer have wooded wetlands, nor their diverse and extensive native wildlife populations.

The negative impacts would be avoided if the permit were denied. The negative impacts would be increasingly reduced if the scope of work was reduced and discharges in wooded wetlands avoided.

Alternatives exist to the proposal that include use of agricultural uplands within the Township/County for residential home sites. These alternatives, or similar ones, would have negative impacts on terrestrial biota, but not as severe as with the proposed work.

3. Effects on Wetlands

The following type and areal extent of wetlands would be eliminated or covered as a direct result of the proposed discharge:

Type	Size (Acre)
PF01	15.96

The following type and areal extent of wetlands would be eliminated/deepened as a direct result of the proposed dredging:

Type	Size (Acre)
PF01	3.74

Recognized wetland functions which would be affected as a result of the project are: flood water storage, natural drainage, runoff filtration and purification, food chain production, and general habitat and nesting, spawning, rearing and resting sites for aquatic and terrestrial species. Wetland values affected include uniqueness, in that this is one of the last remaining such sites in Chesterfield Township/Macomb County; and heritage, which will be lost if the forested wetlands are destroyed by development.

Each of these functions has been objectively documented for the particular site by means of information as described in Section II.C. above.

The applicant proposes compensatory mitigation, which would result in the substitution for 3.74 acres of existing forested wetlands on the parcel. The mitigation involves the removal of all vegetation in these areas and excavation of two to three feet of wetland soils to create emergent wetlands in these areas. These would receive runoff from the storm

water detention basin in the center of the parcel and would in turn runoff into the drain that runs along the NE-SW property line and then empty into the S-O Drain. As discussed in the sections above, functions which are presently provided by the forested wetlands would not be replaced. The proposed compensatory mitigation will not provide functional replacement of the wetland to be impacted by the proposed project for the future.

In summary, the project will have major, short and long term, negative impacts on wetlands. The cumulative effects of such actions may also result in major impairment of wetland resources. Negative impacts can be avoided if the permit is denied, and residential housing is located on available uplands within the Township/County. Negative impacts can be greatly reduced if the permit is severely modified to place a few condominium structures on the upland along Donner Road. This modification would avoid loss of the forested wetlands. If a minimum fill area is required, compensatory mitigation design efforts could also explore the possibility and benefits of removing the berms and other features which presently isolate the wetland from the S-O Drain and receiving waters.

4. Effect on Conservation and Overall Ecology:

Implementation of the proposed activity would impact upon the ecological balance and integrity of a valuable resource: forested wetlands, cover areas, floodplains, and a migratory bird stopover and foraging point. The proposed project would change an area that now supports a variety of species into one that would probably support considerably less diversity. The

proposed work and subsequent operation could lead to gasoline or oil spills, or releases of various residential pollutants such as solvents, soaps, fertilizers, salts, etc., which could result in major adverse impacts. The proposed work would degrade or foreclose the prospect of preservation of an area of high natural heritage value.

Federal and State endangered species lists were consulted. The following endangered or threatened species are known to suspected occur in Macomb County in similar habitats:

Indiana Bat Myotis sodalist

The FWS requests that if it is determined a federal permit can be issued for the project, a survey for the species and its habitat on the parcel be conducted by a qualified individual and provided to them for review. Further, they request that consultation with FWS be completed prior to issuance of any permit in order to ensure impacts to the species are avoided to the greatest extent practicable, or minimized and mitigated.

In summary, the project will have major, short and long term, negative impacts on conservation and the overall ecology. The cumulative impacts of numerous such projects can already be observed in the vicinity where residential development has intruded into forested wetlands, resulting in their loss and fragmentation, been the source of introduced pollutants, and decreased wildlife use and diversity. The negative impacts would be reduced greatly if the permit were denied, and

residential construction were diverted to available uplands in the Township/County.

C. Identified Social Impacts

1. Visual Aesthetics

The proposed work is somewhat consistent with similar type structures found in the area in that most of the area was at one time forested wetlands and nearly all of the residential structures intruded on the wetlands. The development will destroy vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area.

The construction activities will be noticeable from the Donner Road and the immediately adjacent area to the north and south where there are currently condominiums and a residential subdivision, respectively. Beyond this limited area, the proposed work will not be visible. The project may detract from the visual context of the forested wetlands. After project completion, this project will transform an area that may be characterized as undeveloped to one which may be characterized as residentially developed. The net impact of this transformation will depend on individual taste. The construction activities will cause a change in the aesthetic qualities of sight, taste, odor and color of the water and air around the project area.

In summary, the project's effect on aesthetics would be minor, long term, and dependent on personal preference. The cumulative impacts of numerous such projects would be major, long term and again, dependent on personal preference. These cumulative

impacts may be observed elsewhere along Donner Road and throughout the Township where forested wetland tracts have been subdivided and filled for residential developments. Adverse impacts can be minimized if the permit is denied, or modified to allow development of the upland ridge along Donner Road.

2. Noise

Construction activities, including both house and road work, will increase ambient noise for the duration of the work. After construction, use of the project area will create a negligible change in noise levels for receptors located in the immediately area. These would consist of vehicles entering and exiting the parcel and yard power equipment and other residential noise sources such as voice and music. It may be expected that this added noise would occasionally reach the adjacent receptors. The increase is not expected to violate applicable noise criteria.

Within the forested wetlands, however, the project use will be contrary to the tranquil setting of the area. The noise producing activities and other disturbances of residential development use would negatively impact the wildlife remaining in the adjacent areas designated to remain in their natural state.

In summary, the project's effect on noise would be minor, both short and long term, and negative. The cumulative impacts of numerous such projects would be major and negative. Adverse impacts cannot be minimized if the permit is issued.

3. Designated Historic, Cultural, Scenic, and Recreational Values

The up-dated National Register of Historical Places was checked. Registered Historical sites would not be affected by the proposed work. The proposed work would not affect an area designated under the Federal Wild and Scenic Rivers Act, or being considered for such designation. The proposed work would not affect areas designated as Natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, archaeological resources, including Indian religious or cultural sites. We know of no applicable or affected state, regional, or local land use classification due to historic, cultural, scenic, or recreational values.

4. Land Use Patterns

The proposed project is consistent with the existing zoning for the area. The state permit attests to compliance with state government view on land use. From a national perspective, the work may encourage a continuing trend of conversion of wetland areas to upland residential development and a trend of development of natural areas rather than recycling abandoned, previously developed areas, or agricultural areas to more intensive or better uses. The proposed work is in a somewhat natural area in that previous disturbances are so many decades ago that the natural vegetation and community has recovered and reestablished itself.

The area has historically been agricultural. In recent years, residential development in Chesterfield Township, as well as all of Macomb County, has entered the area resulting in sites of more concentrated residential development, often at the loss of agricultural fields which had once been wetlands. As such, the proposed work would perpetuate this recent change in land use patterns, but at the expense of remaining forested wetlands rather than tiled and drained agricultural land. Hence, the proposed work would result in a change to cultural development.

In summary, the project's effect on land use would be minor, long term, and negative. The cumulative effect of the change that this supports would be major, long term, and negative. Adverse impacts can be avoided if the permit is denied, and minimized if construction is restricted to the uplands along Donner Road, or use of primarily upland agricultural fields within Chesterfield Township/Macomb County.

5. Economic Effects

The contractor, equipment supplier, and other commercial enterprises would benefit from the proposed work. The applicant's property value would stabilize or increase as a result of the proposed work. Increased use of the area could benefit local businesses. The local tax revenues, community services, community cohesion would benefit. The proposed work would provide the applicant with an improvement in his interests, which would result in an economic gain. In summary, the project's effect on economics would be minor, short and long term, and positive.

6. Effects on Recreation

The proposed work would destroy an area, which is important to maintenance of populations of game, although it is not in itself open to public use for hunting and fishing. The project would destroy an area of value for passive recreation such as photography, bird watching, walking, and the like.

The project would cause an increase in the number of people in the area, who may in turn degrade existing public recreational facilities in the area. In summary, the project's effect on recreation would be minor, long term, and negative. The cumulative impacts on public recreation would be major and negative as can be observed through the Chesterfield Township area. Adverse impacts can be avoided if the permit is denied or minimized if the permit is extensively modified to restrict development to the upland along Donner Road. This would allow for the continued maintenance of populations of game and use, albeit on private property, of the area for photography, bird watching, walking, and the like.

7. Effects on Safety

During construction and as a result of use of the project, increased numbers of people in the area will increase vehicular traffic and the frequency of accidents. In summary, the project's effect on safety would be minor, long term, and negative. The cumulative impacts of numerous such projects would be minor and negative. Adverse impacts can be minimized if the permit is denied or extensively modified to

restrict development to that number of units which would fit in the upland along Donner Road.

8. Food and Fiber production

No impacts would be expected.

9. Mineral Needs

No impacts would be expected.

10. Energy Conservation and Development

No impacts would be expected.

11. Consideration of Property ownership

The applicant has a right to reasonable private use of the property, subject t the rights and interests of the public in the waters of the United States, including federal navigation servitude and federal regulation for environmental protection. The project will have benefits to the applicant's right to property ownership. A severely downscaled plan would also afford use of the property.

D. Cumulative Effects

For the purpose of this application review, the geographic area for which cumulative effects are being reviewed is Macomb County. The development activities epitomized by this application are discharges of fill material in wetlands for residential construction. Within this area, the Corps of Engineers has issued one Nationwide 29 permit for fill in 6171 square feet of wetland for construction of a residence and two

individual permits. One standard permit was for discharge in 0.32 acres of wetlands with mitigation and the other permit has not been finalized yet, but proposes 0.58 acres of wetland fill with preservation. This latter permit was downsized from an initial request to fill 6.35 of the 8.5 acres of forested wetlands on the 57.0 acre forested site. A third application is in its initial stages for fill in a 25 acre forested site, approximately 10 acres of which are forested wetlands. It is evident, through visual reconnaissance, as well as review of aerial photographs and historical records, that Chesterfield Township, as well as most of Macomb County, has been and remains under tremendous development pressure. Cumulative impacts to forested wetlands due to this type of development has been major and negative. Few continuous woodland parcels, such as the subject parcel, remain in the Township or the County.

In situations where alternatives not involving alteration of wetlands were practicable, proposals have generally been denied.

Similar permit requests may be anticipated if this permit is issued. The Detroit District is currently in the pre-application stage for a similar application for residential development in a 27 acre wooded parcel within two miles of the Carabell site. In addition, there is an empty woodlot immediately across Sutherland-Oemig Drain to the east that may also be subject t similar development pressures. This project will set a precedent because permits are generally not issued for residential subdivisions when there are upland alternatives. Cumulatively, the work would have major adverse impacts as described in the sections above.

The buffering/cleansing ability of wetlands is beneficial to the areas' surface waters. Numerous projects such as this has seriously reduced water quality, habitat, and overall value of the regions lakes and streams.

Activities of this type may change the natural drainage or flushing characteristics of the waterway or its adjacent wetlands.

As a result of the proposed work and other similar projects, this area has experienced an influx of people. This influx has resulted in the destruction of wildlife or fish habitats, increased noise and litter problems, and/or additional environmental impacts (e.g. air pollution, etc.). These impacts may

become significant.

E. General Criteria:

1. The relative extent of the public and private need for the proposed structure or work: The agent for the applicant submitted a copy of Court transcripts from the MDEQ Contested Case Hearing before Administrative Law Judge Richard A. Patterson on the 27th day of October, 1997 wherein his witness states there is a demand for 150 senior units. He based this on a study conducted by his company "last year" [1996] (Encl. 17, Page 167). There is no other demonstrated public need for the project. Presumably, seniors are able to locate a reasonably priced dwelling anywhere within the county. The applicant has a perceived private need to see a return on his investment. There has been no demonstrated private need for the proposed work.

2. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the object of the proposed structure or work: There is an extremely limited, and quickly diminishing, supply of forested wetlands remaining in Chesterfield Township and Macomb County. Sufficient uplands exist within the county for development of multiple residential structures. These may be currently zoned for residential development or a zoning variance could possibly be passed for development on agricultural land in the area. Additionally, the agents witnessed also testified that there, at the time of the Contested Case Hearing, was another available parcel within Chesterfield Township (See Encl. 17, Page 166). Clearly, a less environmentally damaging alternative to forested wetland destruction and resource loss is available.

3. The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited: The proposed project would permanently destroy most of a parcel of forested wetlands. Another portion would be changed as mitigation for the loss of functions. The work would alter public use of the property, but such use is not presently authorized on the property. While the work would provide greater private use of the area, there are other uses for forested wetlands that can be realized without the construction of the residential home sites.

F. Alternatives: The following alternatives have been considered:

Issue the permit as proposed.

Issue the permit with modifications.

Issue the permit with special conditions. As mentioned in paragraph III.A.1.a. above, a permit with special conditions to control sedimentation during construction, will minimize negative construction impacts due to erosion, while fulfilling the project's purposes and beneficial effects on the economy.

Deny the application. (Consider the no action alternative.) The No Action alternative would prevent the avoidable loss of forested wetlands for non-water dependent residential home construction. This alternative would not prevent the applicant from pursuing the construction of new condominium or apartment complexes since the forested wetlands are not the only available land in the Township and/or County.

IV. The portions of this document constituting the Environmental Assessment adequately address the relative magnitude of the expected impacts of the proposed project within our mandatory scope of analysis. The range of possible impact magnitude included no impact, minor impact, major impact, and significant impact as the term significant is defined in regulations implementing NEPA. Our analysis did not indicate the potential for significant impact on the quality of the human environment. Therefore, I do not recommend preparation of an environmental impact statement.

V. 404(b)(1) Guidelines Compliance Evaluation:

The effects of the proposed discharge of dredged or fill material into the waters of the U.S. have been evaluated according to the Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, promulgated in Title 40 CFR 230 pursuant to Section 404 of the 1977 Clean Water Act.

Factual Determinations in light of Subparts C-F of the Guidelines have been set forth under appropriate impact assessments above.

Testing: Subpart H of the Guidelines requires testing of the extraction site of the discharge material for contaminants except under certain circumstances. These include the existence of prior test results, scientific research and/or experience that indicates that contaminants are not present in the material to be discharged. Testing may also be omitted if the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar.

Testing may also be omitted if constraints are available to reduce contamination to acceptable levels, and if the potential discharger is willing and able to implement such constraints. In this case, testing is not required because it has been indicated that the fill material will come from a commercial source.

Mitigation/Alternatives:

The following is a summary of the mitigation sequence as required by the February 10, 1990 Memorandum of Agreement by the EPA and the Corps as it pertains to the proposal and, if applicable, its alternatives.

Avoidance

The proposed discharge would occur in a special aquatic site, a forested wetland. The fundamental, essential, or irreducible activity or use to which the special aquatic site will be put after discharging dredged or fill material and construction ("basic purpose") is shelter, which, per se, does not require access or proximity to or siting within forested wetlands to take place. Therefore, we must presume that there are practicable alternatives to achieve the overall project purpose that do not involve special aquatic sites, and that all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site have less adverse impact on the aquatic ecosystem. The applicant responded to this presumption. Based upon this response, the applicant has not demonstrated satisfactorily that a less damaging practicable alternative does not exist.

The applicant did not adequately address avoidance of wetlands, the first necessary sequence in the Section 404 (b)(1) guidelines. As their alternative analysis, the applicant submitted contested case hearing transcripts indicating there is only one other parcel in Chesterfield Township zoned for multi-family development. They did not explain why they could not pursue use of this parcel. They also failed to address the availability of other upland parcels, the possibility of seeking and being granted zoning variances within the Township, the use of several smaller parcels instead of one large parcel, or change in design to fit the available zoning. This presumption must be overcome before moving to the second hurdle in the Guidelines.

Minimization

The applicant failed to offer an explanation as to why what little upland is available on the parcel could not be fully utilized, thereby minimizing impacts to the wetlands on-site. As described in the sections above, we have identified steps to minimize impacts. We have determined that these steps are appropriate for the reasons specified in those sections, presuming the applicant can make an acceptable argument to meet the avoidance criteria first.

Compensation

The applicant has proposed an exchange of existing forested wetlands through excavation of a small area of forested wetlands to create emergent wetlands (marsh) and open aquatic areas. We determined that this would not be adequate functional replacement.

Section 404 (b)(1) compliance summary matrix

P = Proposal. D = No action (denial). A1, A2 = Additional alternatives, if any. Where only a P is shown, it indicates that all alternatives meet compliance criteria for that item. An unknown is a noncompliance; this will be designated with a U in the DOES NOT COMPLY column.

	MEETS CRITERIA	DOES NOT COMPLY
1. The applicant must overcome the presumption that a practicable, less environmentally damaging alternative site, outside special aquatic sites, exists. If the project is water dependent, OR is not in a special aquatic site, enter only N/A (not applicable).	D	P
2. There must be no alternative that is practicable, is less damaging to the aquatic ecosystem,	D	P

	and has no other significant, adverse environmental effects.	
3.	The discharge must not violate state water quality standards or Clean Water Act Section 307 toxic effluent standards or bans.	P
4.	The project must not jeopardize the continued existence of an endangered species.	P
5.	The project must not cause or contribute to significant* adverse effects on municipal water supplies, plankton, fish, shellfish, wildlife, special aquatic sites, or other aspects of human health or welfare.	P

6.	The project must not cause or contribute to significant* adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems.	P	
7.	The project must not cause or contribute to significant* adverse effects on ecosystem diversity, productivity, or stability.	P	
8.	The project must not cause or contribute to significant* adverse effects on recreational, aesthetic or economic values.	P	
9.	All appropriate and practicable steps, to minimize potential adverse effects of the	D	P

discharge on the
aquatic ecosystem,
must be taken.

*If project does not comply due to this, explain if this determination differs from conclusion regarding an EIS, Section IV. above.

Section 404 (b)(1) Compliance/Non-Compliance Determination

The proposed discharge fails to comply with the 404 (b)(1) Guidelines because it appears that there is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, and the alternative does not have other significant adverse environmental consequences. The applicant has not supplied sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines (40CFRPart230.12 (a) (3) (iv)).

RICHARD J. POLO JR.
LTC, EN
Commanding

Prepared by:

Robert D. Deroche
Project Manager
Permit Evaluation Branch B
Date: 11 September 2000
Enclosures

1. P.N. dated 8 February 2000
2. EPA ltr. dated 7 March 2000
3. FWS ltr. dated 14 March 2000
4. MDEQ ltr. dated 22 February 1994
5. MDEQ FDO dated 30 September 1998
6. MDEQ permit issued 13 November 1998
7. SHPO ltr. dated 7 June 2000
8. MCPA ltr. dated 14 March 2000
9. DWSD ltr. dated 26 January 2000
10. LSAC ltr. dated 17 January 2000
11. Corps ltr. dated 20 March 2000
12. Agent ltr. dated 28 March 2000
13. Agent ltr. dated 23 May 2000
14. MDEQ Hearing Transcripts from 27 October 1997
15. Insp. report from 12 October 1999
16. Insp. report from 5 May 2000
17. Insp. report from 2 August 2000

Reference Materials used in compiling this Assessment include:

USGS topo quad for New Haven, Mich. #48B
NOAA Chart No. 14853
Endangered Species List
National Register of Historical Places
USDA soil survey for Macomb County, MI, issued September 1971
Site Investigation
Ground Photography
Register of Natural Landmarks
Wild and Scenic Rivers Act
404 (b) (1) Guidelines
Fish and Wildlife Service Wetland Inventory Maps

Census Data
Department of the Interior National River Inventory

DEPARTMENT OF THE ARMY
DETROIT DISTRICT, CORPS OF ENGINEERS
BOX 1027
DETROIT, MICHIGAN 48231-1027
October 5, 2000

IN REPLY REFER TO

Engineering & Technical Services Regulatory Office
File No. 99-250-002-1

Keith and June Carabell c/o Tim Stoepker.
Abbott, Nicholson, Quilter, Esshaki and Youngblood
300 River Place, Suite 3000 Detroit, Michigan 48207 .

Dear Mr. and Mrs. Carabell:

I have reached a decision on your application for a Department of the Arm permit to discharge fill material for construction of a condominium development in wetlands at Chesterfield Township, Michigan. After due consideration of the record and the appropriate regulations, I have determined that the project is contrary to the overall public interest, and have decided to deny your request for a permit.

Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site. provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the

region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

This decision was also based on an evaluation of the project's compliance with the 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The Guidelines were developed by the U.S. Environmental Protection Agency pursuant to the 1977 Clean Water Act, and they establish criteria for evaluating proposed projects. The Corps of Engineers is obligated to deny applications for discharges when work does not comply with the Guidelines. One critical threshold of the Guidelines is a thorough consideration of less damaging practicable alternatives.

For projects such as yours, the Guidelines require that, we presume that less damaging alternatives are available unless clearly demonstrated otherwise. You have not overcome this presumption, and therefore your project does not comply.

One apparent less damaging alternative would be to purchase an upland, or primarily upland, parcel of property elsewhere in the Chesterfield Township area that may be zoned or, re-zoned for multi-family residential development. There may be other less damaging alternatives, as well. If there prove to be none, we would give favorable consideration to a project that significantly reduces impacts to the forested wetland on your property, such as construction along Donner Road

that utilizes the upland to the maximum extent possible. We would also require the mitigation to provide for the complete functional replacement of the forested wetlands proposed for development.

You are hereby notified that you and/or your authorized agents) may appeal a denied individual permit under the Corps of Engineers Administrative Appeals Process. Should you wish to appeal this decision, you must fill in and submit the enclosed Request for Appeal (RFA) within 60 days of the date of this letter. Your RFA must be submitted to the division engineer at:

Brigadier General Robert H. Griffin
U.S. Army Corps of Engineers Lakes & Ohio River Division
P.O. Box 1159
Cincinnati, Ohio 45201-1159

Should you have any questions, please contact Bob Deroche at the above address or telephone (313) 226-6813. Please refer to File Number: 99-250-002-1.

Sincerely,
Richard J. Polo Jr.
Lieutenant Colonel,
U.S. Army District Engineer

Enclosures
Copy Furnished:
MDEQ, Livonia (93-14-602)

NOTICE OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Keith and June Carabell
File Number: 99-250-002-1
Date: October 5, 2000

Attached is : Permit Denial

See section below C

***

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps. of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

***

CELRE-ET-RG 99-250-002-1 (1145b)

October 5, 2000 MEMORANDUM FOR Record

SUBJECT; Statement of Findings on Proposed Discharge in wetlands at Chesterfield Township, Michigan by Keith and June Carabell

1. Reference attached Environmental Assessment (EA) on the proposed work.

2. Summary/ Remarks

The agent for the applicant went on record, on two separate occasions as stating that the project is not within a state, or federally regulated wetland (See EA Enclosures 12 (Pg. 2, Para. 2.a.) and 13 (Pg. 1, 2nd Para.)). The record clearly Establishes the site as being used for interstate commerce (neo-tropical, migratory bird stopping point) and as adjacent, to a drain which empties directly into a Section 10 water (See Encl. 16).

The applicant offered an exchange of 3.74. acres of forested wetlands with the same acreage of emergent wetland as mitigation for the 15.87 acres proposed to be eliminated through the discharge of fill material. Compensation is, the final step in the sequence of avoidance, minimization and compensation. Since the presumption of avoidance has not been addressed and satisfied, the offer of compensation is premature.

The project will destroy one of the last remaining forested wetlands in Chesterfield Township, and one

of the last remaining large forested tracts of land in not only the Township, but also in Macomb County. Areas such as this forested wet land provide invaluable habitat for resident and neo-tropical migrant birds, as well as to the dwindling populations of small and large mammals in the area. Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed. Public recreation will suffer through a reduction in populations of bird's and mammals, many of which .are fed and/or photographed by people in this highly developed area. Although one of the applicant's expert witnesses in the contested case hearing states that a recent study reveals a need for 150 senior units within Chesterfield Township, at no time during the processing of this permit application did the applicant; or his agent, indicate the purpose of the work was to construct senior housing. Regardless, we presume that there is a less damaging alternative.

3. Conclusions and Determinations:

a. Compliance with the Section 404 (b) (1) Guidelines of the Clean Water Act: The proposed discharge fails to comply with the Guidelines.

4. Public Interest Determinations:

I determined that the project would have minor, long-term benefits to the economy of the area, as well as the applicant, and to property ownership. I determined that the project would have major, long-

term detriments to water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology. MDEQ has issued their respective permit, and, this reflects positively on the factor of land use.

Weighing the minor benefits that may be reasonably expected to accrue from this project against its reasonably foreseeable detriments, I determined that the detriments greatly outweigh the benefits to the overall public interest. Although MDEQ issued a state permit, land use benefits are outweighed by the total detriments to other national public interest factors. The cumulative impacts of this, and other similar projects would impact wildlife habitat and increase flood hazards, as well as, negatively impact the water quality of the receiving water. These become issues of overriding national importance and require a more stringent evaluation of alternatives and of minimization of impacts. The detriments of the project are therefore significant issues of overriding importance since they outweigh the benefits.

I have determined that the U.S. Department of the in Fish and Wildlife Service (FWS) request that a survey to determine the presence of Indiana bat (Myotis sodalis) or its potential habitat is unwarranted at this time. Consultation must be completed when, as a result of a federal action (in this case, issuance of a Section 404 permit), the Corps of Engineers makes an EFFECT determination. In this case, denial is overwhelming, as issuance of the requested permit would not, be in the public interest.

Therefore, resolution of this issue is unnecessary.

Should the applicant provide compelling reason why a permit should be issued, or submit a plan which significantly reduces impacts to the aquatic environment to a minimal level, the District will conduct consultation with the FWS.

5. Decision:

Review of this application has included all policies of paragraph 320.4, "General Policies for Evaluating Permit Applications." I have concluded that the determination as to denial of the requested permit is within my authority as set forth in 33 CFR Part 325.8. The proposal is contrary to the public interest and denial of the permit is appropriate, even though this decision is contrary to a state decision.

a. The requested permit is denied:

b. The applicant be notified of the decision.

RICHARD J. POLO, JR.
LTC EN,
Commading

[1]RE:
Wetland Application, Robert Leighton & Associates on behalf of June & Keith Carabell, et al,
File 99-250-002-1

PAGE 1 TO 79.

The Wetland, Application Hearing, Taken at 477 Michigan Avenue, Detroit, Michigan,
Commencing at 1:45 p.m., Tuesday, January 30, 2001,
Before Lucy Capobianco, CSR 3061

[2]APPEARANCES

TIMOTHY STOEPKER- Attorney at Law

SUZANNE CHUBB - Appeal Review Officer

ROBERT. D. DEROCHE - Biologist/Project Manager

CLIF SEIBER, P.E., Seiber, Keast & Associates, Inc.

ROBERT LEIGHTON - Robert Leighton Associates, Inc.

KEITH A. CARABELL - Carabell, Leslie & Company.
WALTER GAUTHIER

[3]Detroit, Michigan
Tuesday, January 30, 2001
About 1:45 p.m.

MS. CHUBB: I wanted to do a brief introduction of the conference, what to expect, what this conference is supposed to serve as and what will. happen after the

conference.

This is an informal conference. It is not a formal hearing as you may be used to under the Administrative Procedures Act. It is primarily to discuss the three appeal issues raised by Mr. Carabell and Mr. Stoepker. We can discuss anything that is currently in the district's administrative record, anything that was raised during their review process. This conference would serve to interpret, clarify or explain anything that is in the record and not raise any new issue since the date of the district's denial decision.

Following the conference, even though we are having a court reporter here, I am going to keep my own notes and I will still prepare a memorandum as the regulations require that I do, and I'll provide that both to the appellate and the district, a copy of my notes from the record as well as the record that is being taken by the court reporter. I will prepare a [4]recommendation to General Griffin. He is our division commander. He is the decision maker for the appeal process, and the decision deadline is March 4th, which is a Sunday. That is 90 days from the date we receive the request for appeal.

The decision document is a written document. It will address each of the three points of the appeal reasons separately, and the decision will be made on each point as to whether it has merit or does not and then there will be a discussion following each point explaining that decision.

If one of the points or all are found to have merit the – there is a remand back to the district. The division

engineer does not have the authority to override the district engineer's permit decision. That is not the purpose of this process. If there is a remand, there will be instructions back to the district engineer as to ways to correct the record or to reconsider a portion or-all of the decision.

My last point I believe I have already made but I will repeat it, is that the final permit decision following: the appeal process, if there is a remand, is still at the district engineers' level. So if there is a remand the district engineer will follow whatever instructions are in the decision document for the [5]appeal and then will make a final decision. And that will be the final decision :other than going to-court if there is still disagreement with that decision.

Does anyone have any questions?

MR. CARABELL: What is the timing of that-decision-that you just referred to?

MS. CHUBB : If there is a remand.

MR. CARABELL: I understand the March 4th, but if you remand it, what is the timing on that?

MS. CHUBB : There is nothing in the regulations that specifies a specific time frame where the district has to follow up with a final decision. It depends on what instructions are given. It could be minor things to be done or something major. It was left open for that reason because they couldn't take into consideration what all-could be in those final instructions, so there is no set time frame in the regulation.

MR. CAPABELL: Is there anything-in the law system that you know of regarding timing on that?

MR. STOEPKER: No.

MR. CARABELL: Who is engineer that is that person?

MS. CHUBB: Colonel Richard Polo Jr.

MR. CARABELL: Is this the one that wrote the [6]27 page thing?

MS. CHUBB.: He made the original district decisions.

MR. LEIGHTON: A General can't overrule him.

MS. CHUBB : No.

MR. LEIGHTON: The chain of command breaks down, I guess.

MR. STOEPKER : Understood.

MS. CHUBB : Did you have formal presentation or anything that you had planned at this point?

MR. STOEPKER : We thought we would-do the best thing we could do is probably go through the denial letter that was issued October 5th, 2000 and respond to the issues that were raised in there the best that we can noting the documents that we had submitted to the department and have Mr. Leighton and Seiber comment depending on appropriateness. of whatever those issue are.

And then since this is an informal discussion back and forth as relates to those issues. We did have our site visit this morning, walked the site at approximately 9:00. o'clock, and there was really very limited discussion out there as we went through.

So that was part of the procedure, was to go [7]out and do a site examination, and there were representatives, all of us -- about two-of us were there today. So Mr. Gauthier you were not there and Pat O'Connor was not there. The rest of us were at the site.

The best way I can do this is go through the response, and the response that was issued October 5th, 2000 from the Department of the Army back to my office and signed by a Lieutenant Colonel, Richard J. Polo; included the permit application process and then what was entitled Department of the Army Permit Evaluation Carabell Condos.

And then attached to that was a supplemental document memorandum for the record was also attached. Starting with the letter itself that was issued, one of the issues that we want to I guess make clear from the record, one the questions that was raised on page two of the letter had to do with the issue of an alternative site and whether or not there was an alternative site.

The second paragraph of the letter says one apparent less damaging alternative would be to purchase an upland or primarily upland parcel of property elsewhere in the Chesterfield Township area that may be zoned or rezoned for multi-family residential development, and I'm not sure whether or not the

department did any study to determine whether or not there was any such property that was available.

The record that we submitted to you which included the transcripts of the trial or administrative trial that was conducted by the state of Michigan, Department of Environmental-Quality; included testimony by the Chesterfield Township planner who is a consultant to Chesterfield Township. His name was Mr.-Maher, and his name was included within the document submitted to you. And Mr. Maher testified regarding this very issue and his testimony was that there was only one other subject property at that time that had a multiple family zoning designation within the Township, and there was no other property planned for that, and that we cited the transcript-pages there from his transcript of October 27th, 1997, pages 157, 167 of that transcript-through 212.

His testimony was that there was a demand within the Township for senior housing at least 150 senior housing type units that the subject property at issue met the criteria for such a development and for multi-family development, that the proposed RM-3 zones was consistent with their master plan-in the area. That the plan did not designate the subject property as [9]a park or other recreational facility. That the Township in 1987 in a prior multi-family application had advocated approval of a multi-family development on the site, and there was a significant demand within the community for multi-family development.

This was confirmed by Mr. Hernandez who was our market analysis. Mr. Hernandez is employed with Remax Realty. They were the number one residential

brokerage firm within the Macomb County area who confirmed there was no other available sites for multi-family development within the Township other than the one here that

MS. CHUBB: Was that strictly based on the current zoning?

MR. STOEPKER: Current zoning and master plan. We not only looked at the zoning ordinance, but within the Township itself they could only identify one potential area other than our subject, property that had the RM3 zoning, and where there would be RM3 permitted within the Township.

So what it amounted to is at the time the evidence was taken we had the one of the two parcels within the community that were available, and the community had designated units in excess of what we could build on our sites as required for multi-family.

[10]MS. CHUBB: Can there be revisions to the master plan?

MR. STOEPCKER: Well, certainly a master plan is subject to revisions over time. Chesterfield is a relatively built out community with commercial, single family and industrial and multi-family patterns already established pretty much, and the area that we look at here off Donner, for example, you would start off at 23 Mile and you have commercial on 23 Mile, and as it goes back in on the -- is it east, side of Donner, that is all multi-family, and then it abuts the Selfridge, multi-family -- Selfridge Air Force base multi-family residential area, and then you have single family across

the street.

So without exploring and the hit and miss, the best way for a developer or property owner to know whether or not the property is slated for either single family or multi-family or whatever, is, not only to look at the zoning ordinance map which is the law, what confines that, what can be built within the area, but you look at the long term plan.

To be supportive by law, the master plan has to have some kind of rationale to it. And the purpose of the plan is to be a guideline for people who are developing within the community as to where they should [11]place their developments., and this site is a master plan and is zoned for RM3 use, and so we are not aware sitting here today whether or not there would be any other parcel that would fit the needs, because there is none other than the one that was identified by Mr. Maker that is available for multi-family. To the best of our knowledge this is it.

In addition to that, and this is a separate issue, but I think it is a germane issue, this is not a case where the amount of wet land designated by both the MDEQ and Army Corp is an insignificant portion of the property.

Our client bought this property in 1969 prior to the adoption of the statutes, and then the regulations that were formed thereafter for regulating this land for purposes of wetland regulation and application of the statute in the regulations to the, property would tender the property useless because of the amount of wetland that is on the site. And as you are aware having walked the site, really the old upland area is the drain that was

artificially created and the clay spoils were dug from the drain and dug on the side and that was identified, not certified; and there was some upland on the lower portion which was artificially created through somebody dumping spoils there. We have [12]no idea even when that occurred.

So the upland areas contain spoils as a consequence of the drain, and probably somebody else dumping spoils from a building space. And to say you go to another piece would deny the use of this land, would effectively take the land away from the property owner, and the property would remain vacant.

Maybe that is an objective from a government perspective, but to render the property useless, there is ramifications for that. And certainly it is not prudent and feasible to buy one piece and then go buy another piece of property within the Township. So it is certainly not prudent or feasible within that regard to leave this property vacant and then go buy another parcel.

Certainly to the best of our knowledge, neither the State or Township, nor this department has identified any other available property for that purpose. So even though it is mentioned in their letter, there is no substantive information to support that position, and certainly what better person to testify or to bring information to light on that then the Township and planner who is in charge of planning and development for that particular community.

Mr. DEROCHE: Can I interject here? There is [13]also a narrow strip of upland along Donner Road, and also when we put together our decision document and

looked at alternatives, yes, you provided your testimony from your zoning expert from Chesterfield Township, whatever, and he said that there was one other piece of property zoned for RM3 or whatever it was, but there was not any support as to why that was not sought after.

There is nothing in the documents as to why that piece of property wasn't looked at that might have had a much larger portion of upland on it, and also there was nothing in the record which stated anything about seeking zoning variance with the Township. I would just like to point that out.

MR. STOEPKER : I agree with you, and we did not discuss seeking a zoning variance for the Township in essence to do what you're saying, and what initially the statutes say would be to abandon this property. It was not bought in 1969 to be a park for the surrounding neighborhood. It was not to be a natural resources to be supported by one tax payer for the benefit or the other tax payers. If that is the intent here, someone should step up and say we should buy this property as a natural resource for the general public.

You can look at the other RM3 piece, but that [14]would render this piece vacant. He pays the taxes on this. He had to pay for the special assessment to run the utilities, both sanitary storm and water, and has paid that over the time, plus he paid property taxes on the fair market value of the land.

It may be an alternative, but it is certainly not prudent and feasible, and I don't think anybody in this room would abandon their house and go buy another lot and

let their lot sit vacant and let this accrue taxes and charges against, it and not be able to use it.

In addition to that, Mr. Hernandez testified that available acreage, to the extent it would be available, and we don't know whether it was marketable or not, would cost no less than 43,404 an acre to buy why would someone who bought property in 1969 at a value less than that go out and buy property at 43,000 an acre to develop it when he already owns the land. That is not prudent or feasible either.

So the record is clear, Mr. Maher was not our expert. He was employed by the Township. We called him as an independent witness not knowing what he would say at all. There is no discovery in the MDEQ proceedings. I don't know what he is going to say. He worked for the Township, not for us, so his testimony[15] is independent, I guess is the best way I can put it, so, Bob, that is the best way I can respond to your question.

The next point that -- I think it was raised on page two of the report, and this is just a minor point and maybe it is my venting a little bit about the frustration of this process, but Mr. Carabell through Mr. Leighton filed an amended application to this department and to the State. I think it was 1993, and at that time there was an EPA letter that came out, though not timely from the State's perspective, it was issued objecting to the project as then proposed at that time. It was a 130 unit Township condominium project, 130 units. Within that letter, the EPA stated that if there ever were any restrictions to the plans that were submitted to the State, that those plans would be submitted at least to

the EPA, and theoretically I would assume to this department.

He did not know that until after we tried this case at the State level, that even though we had submitted alternative development plans and analysis, that this department nor the EPA had not been provided that information by the State. We thought we were going on a simultaneous course with the Federal Government and the EPA and Army Corp, so we wouldn't [16] do due process twice, but that is what we're doing.

Unfortunately, the State did not do so. We then conducted a full trial on other permit applications. A Proposed Judgment came out, and a Judgment came out and the State refused to issue the permit, and it was not until after the Judgment was issued that the EPA then objected, but that was only slightly before the permit, so on page two it states that the EPA objected prior to the issuance of the permit, but in actuality, the issuance of the permit was merely perfunctory obligation by the State pursuant to the judge's order. The judge had already decided this case. Unfortunately, this department or the EPA should had been included in a process which would have saved substantial time by all of us here.

But through that process the alternatives that were submitted were twofold. One, the plan that you have in front of you here which is included in your documents which reduce the number of units in a ranch style setting to 106 units with either a wetland enhancement proposal or a natural preservation proposal. The other alternative was a 112 unit townhouse concept that was also examined and submitted as an alternative.

[17]Additionally to that, at the time of the hearing the state submitted a proposal through an expert regarding 24 units along Donner Road, and as Mr. Deroche indicated, there is some upland there, but even that proposal resulted in an encroachment into the wetland area, the lineal distance of Donner Road, and did now answer a number of questions regarding curb cuts and things of that nature. But the development had to be pushed in, because this is a county road and it was understood you only would have one or two curb cuts, so the units would go along Donner and then be pushed in, 24 of them were proposed, and there was a detailed financial analysis done of that by Mr. Seiber and we'll talk about that.

None of those were given to the department of the EPA prior to the time of the Judgement. So we did consider a 24 unit analysis or 24 unit project which would utilize some of the upland, but would have utilized the encroachment to the wetland would have been complete. The small upland area along Donner would have been the front yard set back between, and the driveways and units would have been set back further into the property to the east. I got this upside down. To the east.

The next question I guess is for discussion [18]purposes, and this is more of a legal issue but is factually based, and that goes to page two of the response issued by the department, and that is the statement of a jurisdiction pursuant to Section 404 of the Clean Water Act.

My question is we need to have it identified, because it is not identified within the letter anywhere under

which section or provision that the Federal Government has jurisdiction over this site. I guess we need an answer to that, because you state – you make a conclusionary (sic) statement in your letter that there is jurisdiction pursuant to Section 404 of the Clean Water Act, but you don't tell us under what is the fact that gives you the jurisdiction, and as you have noted, we have objected to jurisdiction here. We objected from day one.

Based upon the recent decisions of the Supreme Court of northern Cook County, there is no doubt in my mind that you don't have jurisdiction. We need to know what your position is on that, because it doesn't tell us in your letter.

MR. GAUTHIER: It is a water of the United States. It is a wetland adjacent to a surface tributary system that is part of the surface by virtue of the fact that it's adjacent to the surface tributary [19]system. It is a water of the United States, and the decision that you have cited pertains to isolated water, and this is not an isolated water.

MR. STOEPKER: Okay. Is it felt – looking at the statute and the rule, it talks about navigable. Clearly this is not adjacent to the Great Lakes or open body of water.

MR. GAUTHIER: It is adjacent to the surface tributary system that eventually flows and involves Lake St. Clair. If it is part of that surface tributary system and it is not isolated by virtue of natural topography, then it is a water of the United States.

MR. STOEPKER: The question I have is can you cite to me where it says natural tributary system in the rules or statutes? I'm aware it says navigable. We were there today and there is nothing navigable here. A sailboat could not move up and navigate this. Does the drain flow north or south based upon the changes? Does it, in fact, flow into Lake St. Clair?

MS. CHUBB: I think it is a separate question that will probably be answered in the appeal decision.

MR. STOEPKER: I guess my question to you, Mr. Gauthier, where does it say tributary?

[20]MS. CHUBB: Tributary to the navigable water, is what you're asking?

MR. STOEPKER: Right.

MS. CHUBB: That is really a question for the division. It is not a question for the district. It may end up that way, but initially this is a division process.

MR. STOEPKER: So just to be clear, the department is not relying on this migratory bird rule?

MR. GAUTHIER: No.

MR. STOEPKER: Okay. I'm looking at a section of the regulations where it talks about interstate wetlands. All other water such as interstate lakes, rivers, streams, including intermittent streams, wetlands mud flats, sand flats, then which could effect interstate or foreign commerce, including such waters which are or could be used by interstate or foreign

travelers for interstate or other purposes from which fishing or shellfish could or would be taken from interstate commerce.

Does anybody find any shellfish within the Oemig Drain? Are any fish at all in the interstate commerce, is that the position you're taking? The next qualification – I mean is that the answer yes or no? I need to know.

[21]MS. CHUBB: This is not an inquisition here. It is more of your presentation. Their record stands alone as it currently is. Whatever is in here is their position. That is the best they can do at this time.

MR. STOEPKER: Okay. Then if we turn to the report, it talks about the lack of an alternative, a feasible analysis, page two at the bottom. And I quote, "they object to issuance of a federal permit, this is being the EPA, unless the applicant provides an adequate alternative analysis." That is one portion. "Demonstrates that wetland impacts have been avoided and minimized to the maximum extent practicable and provides an acceptable mitigation plan to construct in-kind wetland mitigation at a minimum ratio of one to five."

And I'm not sure again what the objection is, but we can divide this up in two points really. Mr. Seiber testified extensively at the trial and did the basic research, and what I would like him to do is go through with you right now what we did from a prudent feasibility standpoint. I dare say the State of Michigan, and I'll venture to say that you have never had the engineering analysis and mathematical and market analysis that was done in reference to this particular

project here that we did in this case.

[22]We had initialiy hired Premises and Associates which did an analysis. They are a division of SHT, a large architectural firm within the industry who concluded there was no practicable feasible alternative. I think we hired Mr. Sieber, who is a well known engineer whose qualifications are mentioned in the record, and Clif, if you could go through, first of all, your background and explain that and go through the analysis that you went through.

MR. SIEBERT: All right. I'm a registered engineer in Michigan, principal of the firm Sieber, Keast and Associates, and the primary function of our firm is to develop engineering design plans for new development such as condominiums, single family residential sites, shopping centers, industrial parks, pretty much any type of development.

What I did with the approach to this project was to develop eight different types or eight different scenarios and assign project costs to those different scenarios. I could briefly summarize those eight scenarios.

The first one provided for the 112 units shown on the plan that is on the table here, and this scenario included mitigation offsite to compensate for the wetland fill on this project. Upon preparing a [23]design of the utilities of the site and assigning unit prices from contractor bidding, I concluded that on this first scenario there was a loss per – overall loss of 2.26 percent when the offsite mitigation is included.

A second scenario was also prepared which provided for on site enhancement of the 112 townhouse units, and under that condition a profit of 4.79 percent was obtained.

Then there were two other scenarios, one for the 106 unit ranch home type product, and when including an offsite mitigation for to compensate for the on site fill, we ended up with a loss of around 2.17 percent.

Then under the 106 unit ranch type homes, an alternative, which included on site enhancement was investigated, and we had approximately 5.13 percent profit.

Next we looked at the 24 unit scenario which included a condominium located along Donner Road, and in that case the same procedure was followed, where a design of the utilities was prepared and then unit prices obtained from contractors were plugged into those total quantities, and we obtained a cost for the overall project under that condition with the 24 unit [24]townhouse project with offsite mitigation resulted in a loss of 16.24 percent on the overall project. That is a percentage of the total of the project costs.

The next analysis was the 24 unit townhouse project with on site enhancement. Under the condition there was a loss of 7.17 percent.

Next there was a 24 unit offsite mitigation scenario utilized the ranch homes. Under that condition there was a 13.8 percent loss.

And then finally under again with the 24 units utilizing

on site enhancements with the ranch type units with a loss of 5.58 percent.

Clearly with the 24 unit condition of condominium homes located adjacent to Donner Road, all those resulted to the net loss to the project site was not a reasonable and prudent alternative for that type of development.

MR. STOEPKER: From a pricing standpoint, what we did do so we were pretty clear on that, the acreage price per unit was established through Mr. Hernandez, through ReMax. He did a market analysis of what open acreage would be purchased for in the Macomb County area, and I think it ranged from 36 to 37 to 43,000, in that area, and he subscribed also based upon his knowledge of it, a unit, retail selling price of a [25]unit, so you could show the differential and, you know, gross income valuation of the real estate, and then what Mr. Seiber included within his analysis is all the infrastructure cost and then the building unit cost per unit which was established. So the analysis included cost of acreage, retail sale price of the unit, all the infrastructure improvements and the per unit building costs for either a townhouse or ranch unit.

Then obviously included with that, depending on what the scenario was, if you could get land for offsite mitigation. The problem that you have with this particular site is that due to the degree of the wetland, if you apply their one to one half ratio sitting here today, I don't know where anybody comes up with that number. It is not in any statute that we seen, but that seems to be a number that is drawn out of the air and thrown at us both and consistent. The state and Army

Corp both suggested that. It makes it impossible. You have to go out and buy 30 or 20.

MR. SIEBER: I think it was around 19 acres.

MR. STOEPKER: To develop 15.

MR. LEIGHTON: It doesn't work that way. You end up buying a lot more land.

MR. STOEPKER: So if this was the case where a determination had been made, maybe 20 percent or 10 [26]percent or 15 or something, your scenario might be different in a typical recommendation, one and a half might be feasible, but under this scenario it doesn't work.

Now, the state had an expert testify who raised this 24 unit issue. There are two issues with that. One, he would not identify the property cost. His equations did not include the value of real estate. I don't know why.

And then second, when we asked him where he got his numbers, from, he invoked attorney/client privilege, which I thought was kind of strange. He was their expert, but he happened to be a lawyer and he said he got this information from somebody but he wouldn't divulge. But the most clear thing that was absent, he did not include the value of real estate, which you have to include, especially if you're going to do an offsite mitigation as to the acreage available.

He really never disputed, to the best of my knowledge, the cost that Clif submitted as an engineer, and Clif's firm has done numerous developments and we

submitted the curriculum vitae to the state.

MS. CHUBB: What year, what was the date that you did those estimates, and how relevant would they [27]have carried over to the state process, to the federal?

MR. SEIBER: The estimates are dated January 12th, '98.

MS. CHUBB: And how long do they stay current?

MR. SEIBER: Well, there has been some increase since that time. You know, that is about a three year period. There has been some increase in contractor prices since then as well as I suppose an increase in housing, sale price, too, which may kind of offset that.

MR. STOEPKER: The issues Mr. Hernandez testified to is there is limited multi-family that is available, so, therefore, the price is set based upon the market. Part of that has to do with is that communities do not zone much of their property multi-family, they preferred single ranch style. This piece was multi-family, because it is all the apartments you saw as you drove down Donner, and because of its adjacent to the Selfridge Base. We try to make it more of the single family type looking concept by the ranch, which would be based upon what the Township had suggested for senior using. We knew we got less units that way, but since their emphasis [28]was for more senior housing, but availability for empty nesters and things of that nature, we said we'd look at that, and that actually reduces the number of units by six – not only six from the 112, but down from the original 130 that was proposed. I'm

trying to think about back in '87 if there were 170 apartment units that were proposed for that site. I don't think that was reviewed by this department, but just by the state.

MR. DEROCHE: Can I just say that the EPA, as administrator for the 404 program is I believe where that 1.45 mitigation ratio came from, mitigation guidelines, I believe. Is that right, Wally, it is maybe not in their guidelines, but –

MR. GAUTHIER: Certainly.

MR. DEROCHE: Certainly I know that the EPA in their letter recommended a ratio for 1.5.

MR. STOEPKER: It is a fictitious number, and everybody seemed to follow that number. But in looking at this, and this dovetails into what Bob's expertise is, we looked at that, and, you know, sometimes maybe being a mitigation parcel and creating a wetland does make sense, but there are other ways of mitigating, and that was recognized n this instance, and what we tried to do was take a piece when you go through the financial analysis and say it is fair to this property [29]owner who has owned this since '69 to abandon this and go out and buy another parcel for development purposes, and the answer to that was no what we determined.

When you're faced with that and looking at all the other alternatives, we didn't rush this through. We filed this application in '93 and our trail was in '98. We made every effort to try to come up with a solution that made sense. It was our initiative to reduce the number of

issues and come up with a concept of mitigation that we thought met the spirit and intent of purpose of the federal and state laws and regulations adopted under that.

That goes in to why we suggested both the preservation plan and the alternative for the Township or the ranch style units which would have been a cheaper plan. We threw those both out there, because to leave alone what is not there and not touch is certainly less expensive than to create something that doesn't exist. We recommended at the hearing that was more cost from Mr. Carabell's standpoint was this enhancement plan. So that goes to the next portion of that letter.

MR. CARABELL: Can I why ask a question there? I don't understand all this that is on the record regarding this mitigation issue. Has the [30]Federal Government decided or its agency decided that that has no merit, is that what the conclusion is?

MS. CHUBB: Does what have no merit?

MR. CARABELL: That mitigation was not prudent or feasible and it was testified to, matter of record and ruled upon. Does that have no merit to you people who are now reviewing this information?

MS. CHUBB: My current understanding is that that was a state process and it does not have any binding effect on the federal review of the project.

MR. STOEPKER: I think and we could – that is a legal issue. I think what Bob is saying, it was his

understanding that there is some edict some place that says one to one and a half, and to date we have never found that either at the federal or state level. I don't know where that number comes from.

We have even seen it one to two and it changes, and when looking at both statutes, the state and federal statute is we knew that, you know, this process entailed both reviews. We looked at and said what can we do with this site that will make it environmentally better than it is now and meet the objectives of the statute while allowing this developer to build on the site, and that is where Bob came in and came up with two concepts.

[31]One which was more expensive but which is what we're recommending for purposes of this permit, and so in looking at the last question or statement here demonstrating that the wetland impacts have been avoided and minimized to the maximum extent predictable and provided a maximum mitigation plan. I admit I ignored the one and a half, because I don't think that is relevant here. I think Bob why don't you go through your analysis of the property and why you have recommended what you are recommending.

MR. LEIGHTON: By the way, the State Highway Department is one for on, and I have never understood that their mitigation ratio is always one for one. This property is somewhat isolated, the wetland is somewhat isolated. It is surrounded on one side by a retention base and it is quite deep on the north side. I think the water on the retention base is four to six feet below the surface of the ground. The drain that runs along the hypotenuse of this angle takes water from

upstream water headed by the property. It is independent of the property. There is a berm that runs along the edge of the drain and holds the water in the drain and holds the water on the site. There is very little communication between the drain and wetland on the property. The drain is lower than the site.

[32]By the same token, the drain that runs along Donner Road again isolates this wetland from any outside watershed. So really all we have here is a fairly monotypic culture, mostly Cottonwood. There is some Elm and Silver Maple in there, with very little ground vegetation.

We brought photographs along so you can see how bare the ground surface is. That is primarily because you do get some standing water in there for a period of time and it dries up, and plants would survive that change. So it is bare ground for the most part. The only rain or hydrology it gets is precipitation, and it is really limited to that, so it is not handling large volumes of water and it is – it lacks, diversity. There is not a whole lot of cover, at least on the ground plane, there might be some cover in the other areas possibly for birds, but the ground plane is pretty open and it is not a place where wildlife is good going to feel comfortable in terms of having shelter. There is not a huge food supply for most inhabitants, and again it is just not very diverse.

MR. STOEPKER: I just want to interject. The vast majority of the understudy is in the upland and that was recognized even by the state consultant in [33]their reviews.

MR. LEIGHTON: That is still expressly limited even

along the dike, there is Box Elder and Grapevine, and I think there is some Wild Rose, but it is really not, you know, it is a choked-out kind of area that gets cut every so often by the Detroit Edison because of the power line easement that runs through there the drain is subject to being cleaned out, because the drain commissioner has a good reputation of doing that up in Macomb County. That is subject to change over time. It depends on what agency comes in and does their thing.

As a result, we have a wetland that if you were to add up all the functional aspects, I think is pretty low on the scale. So the reason we proposed enhancement – by the way, I don't have any problem with leaving it as a forest as well. It would be a significant piece of the site if it were just left. I really don't have a problem with that. I think the advantage of the enhancement is that – by the way, I noticed in the review it was stated that storm water is discharged into the enhancement area. That is not true. The storm water is discharged to the drain. The enhancement is separate in the enhancement system on the site. The intent for that is to begin to deal [34]with offsite water, water that is coming in from the upstream watershed. The enhancement would be excavated down to the ditch elevation with existing trees. You can save the better trees and maybe take out some of the smaller ones.

When you do the enhancement you would introduce some water, some different diversity into the site and increase flood storage, if that is, in fact, a problem. It was brought up in the review as being a problem, but this would be a very large increase in the storage capacity in the flood system, and it would do a lot of

filter water, because as you know the first flush is really the concern, that first surge of water that comes down through, and this would provide an area for that first flush to go into and be stored and filtered out. And then later on as the cleaner water comes down, it would just go through as it normally does.

So there seems to be in other minds some benefits to taking some of the Cottonwoods down. They aren't good for firewood. They are pretty useless as far as a fire goes. They certainly don't have any lumber value. If you burn it in your fireplace the chimney would get plugged up with creosol. Cotton was generally known as a nuisance plant. Taking some of [35]those down and reintroducing some higher quality vegetation in my mind would be a big improvement in that forested area.

MS. CHUBB: Is that based on strictly looking at that site or are you looking at what else is available in the county or in the township or in terms of wetland resource base, the percentages emergent, things in the emergent category?

MR. LEIGHTON: I have never done an inventory of the county, but I look at a lot of property, thousands of acres. We do an average of about 300 development projects a year, so I'm out there looking at the properties that are really of interest, and you'll find in the lake bottom counties there isn't a lot of diversity. There is a lot of this kind of wetland, this forested wetland, there is a lot of it.

I know it is contrary to what is being said in here, but the truth is if you go over these counties in an airplane you don't see much open land, it is mostly forested.

There are agricultural fields, but agriculture stopped a long time ago in this area. Some of them are very young trees. You have real heavy clay. When they were farming it, they had ag tile put in the ground and then it plugs up and they stop farming. With the clay soil most of it automatically [36]reverts into a forest type environment.

Most of the property I look at there are hardly any sites put there without wetlands. The Cottonwood certainly is out there a lot. If you get into something as pin oaks (phonetic), some of the higher quality vegetation, it is few and far between. You have to go out into the areas that are left over from the glaciers. It is mostly Cottonwood and Elm and Silver Maple. It is not an unusual site I don't think. I think there is a lot more out there than this report indicates. You have to get in an airplane to see it.

MS. CHUBB: Although you don't necessarily know from an airplane if you're looking at forested wetland or upland.

MR. LEIGHTON: The amount of acres I have seen of upland forested in Macomb County is small that is the function of the soil type, the drainage. You're not going to get those kind of trees because they have to have good drainage.

See, when the lake came in after the glacier and the lake receded, there are a number of times when it came back into the land and receded again. Every time it did that it would build sand dunes. Once in awhile you would catch a ridge out in some of these [37]sites where there is some sand, maybe three or four feet deep and

you'll hit the clay. On that ridge you'll see some maybe Black Ash or Cherry. Sometimes you will see it mixed in with the wetland forested complexes.

The percentage of upland is a lot lower than the wetland to the point of it – a lot of times it is difficult to build on these woods, because the uplands area are so sparse. You would be so fragmented that economically you wouldn't be able to fill it. This is not a unique site I think in my mind, and that is kind of the rationale for the enhancement.

If you want to save the trees, I don't think that is a big problem either. If you do perceive flooding problems and short of the offsite water quality concerns, the enhancement would do a lot to begin to take care of that. The existing forested wetlands is not filtering any offsite water, an dif it did, there is no ground plant vegetation anyway. My lawn area would filter more area than that if you did have water running across there. You would have all kinds of silt in the drainage system.

MS. CHUBB: Is there a ditch on the north property line?

MR. STOEPKER: There is a retention pond.

[38]MR. LEIGHTON: There is a fairly large retention pond.

MR. STOEPKER: There is that last development of multi-family units north of this site.

MR. LEIGHTON: I was curious today, this big federal

housing project has no retention pond.

MR. DEROCHE: There isn't one. We just saw the one edge of it.

MR. STOEPKER: On page three of the report, and this was something I think that was touched upon in the field a little bit, and that had to do with the issues raised by the department regarding Indiana bats. On potentiality, or the based upon the habitat on the site, and we had responded back to the department in the position that we have taken and continued to take, is this site has been the subject of analysis by either the State of Michigan Department of Environmental Quality or by the EPA and the Army Corp jointly since 1987, and in reference to this particular project, since 1993 when the first proposal came in, this proposal came in for the 130 unit, the EPA issued a letter as did Fish and Wildlife, and then the Fish and Wildlife issued a second letter during that process stating equivocally there is no endangered or rare species on the property.

[39]More recently, in the response to the analysis done by the Army Corp they restated that position, and to the best of my knowledge there has been no sighting of any Indiana bats. It has been stated that no mesh netting has gone up to discover that, but to me, based upon the almost – let's see if my math is right, 12 or 14 years that this site has been looked at, it certainly in my mind is conceivable that somebody would have sighted this within the departments and said there is, this out there. There is Indiana bats out there.

To ask someone to prove a negative to me is a very difficult thing to do. It is not our burden to do so. What

we're relying upon is the findings made by the Federal Government that there is no endangered species on the property.

MS. CHUBB: I know I mentioned that this morning at the site visit that I don't believe my reading of the decision document that didn't come up in district as a controlling factor or denial.

MR. STOEPKER: We may have to talk about that. We're not sure in going through that. That is the last page, I think, is what you're talking about. The one with the – page 25, the chart. That is kind of a summary chart.

[40]MS. CHUBB: No, no, I didn't get that from that.

MR. LEIGHTON: At the conclusion part you mean.

MS. CHUBB: This introductory part is simply a summary of the comments that they received on public notice. They are restating different positions of other agencies and things.

MR. STOEPKER: We're trying to address the substantive issues raised in the report through this by saying yes, did you pick this and the nature of the habitat.

So at any rate, I mean the response I guess we have given back to that. On page six, Bob, there was the discussion regarding loss of habitat on this property and your analysis of the site. Could you describe the basic habitat.

MR. LEIGHTON: Again it is limited because of the lack of diversity. There is habitat there, but again if you were to add it up, I don't think it would score very high. If it very limited in diversity. Whatever scale you want to use. Cottonwood is Cottonwood. If you value Cottonwood and you think the big woods of Cottonwood is environmentally a powerful resource, I guess I wouldn't argue with you. I find [41]Cottonwood to be more of a nuisance than a value.

MR. STOEPKER: The other comment I would make is in reference to there is mention of the migratory birds traveling through the area, but there is certainly no indication that there is a lack of habitat for migratory birds within the area at all.

So the loss of these trees to the extent, by the way, which are not regulated by any statute, I mean Mr. Carabell can come tomorrow and can cut down every tree that is there. Why we're even dealing with that, if that is the habitat we're talking about, first of all, it is not regulated.

Second, to the extent it could be regulated, there is nothing demonstrating that I have seen that to the loss of these trees, to the extent there would be a loss, results in a loss of migratory birds.

You know, I'm not an expert on this, but I live in an old developed suburban community that is heavily treed, not much different than actually this property is, and there is no loss of migratory birds within that treed area that might be scientific but nor is the statement within the report that to the extent that is the habitat they're talking about that the loss of that will somehow

jeopardize migrating birds since we don't have any significant standing water except [42]maybe at a limited time of the year.

This is not a site that has been demonstrated to support any type of waterfall at all. So if that is the habitat that is being discussed, that is not regulated and it is certainly not indicated to be something that would be detrimental to migratory birds where there is a lack of habitat within the area to migratory birds.

One of the other issue that was sited in the letter was the objection from the local community in reference to that there was a letter that was sent by the local prosecutor. I might tell you that we responded to that letter with a letter dated April 5th, 2000, provided a great deal of information to that prosecutor, asking him to meet with us, and he never took us up on that invitation. I don't know why. Am I aware that he hired anybody to do any study for him. Mr. Gun (phonetic) whose names was not mentioned in here. He responded to the last public notice I think that was sent. He doesn't represent any kind of conservation group, none of the organization groups, environmental groups, none of the local communities other than the prosecutor objected to the development on this site.

In fact, if you read the transcript where Mr. Gun testified at the hearing, he thought – he agreed [43]that this was a very marginal wetland and that something should be done to enhance the wetland which is, in fact, what we did so, yes, Mr. Gun did say no, but Mr. Gun represents Mr. Gun and nobody beyond Mr. Gun, and all the recognized conservation groups which are copied on that never responded, and there was no objection

from the Macomb County Drain Commission or Chesterfield Township or Macomb County except through the prosecutor's knowledge of this project was nothing and didn't want to be informed frankly.

MR. LEIGHTON: Mr. Gun was objecting to the fact that we are going to affect the recharge of the ground water.

MR. STOEPKER: That is not even applicable here. So his complaints to that extent shows he doesn't even understand the type of land that we're dealing with. There is minimal or no local objection. Clearly there was none from Chesterfield or from the Drain Commission or Macomb County rain Commission who was in charge of issues relating to soil erosion or flood control within the community. And obviously the state has already given their answer on this issue.

I think, Bob, you talked about on page four of the report there was the issue of, I think it was raised, and this may be in response to Mr. Gunk's [44]comments regarding the filtering purpose of this wetland.

MR. LEIGHTON: Well, it is not receiving any water from outside, so, yes, I guess the rain water or the precipitation would sit there. I don't know, there is a lot of sediments in rain water typically. It might be some acid in the rain water. The way it is set up there is no water passing through it so it doesn't filter anything other than precipitation, if it filters even that.

MR. STOEPKER: There was a complaint made about recharging the ground water.

MR. GAUTHIER: We had to fairly summarize the issue of –

MR. LEIGHTON: We have built a couple golf courses where we tried to go down and put wells into irrigation and there was no groundwater. We could not find well capacity down there. A lot of these areas out here is clay forever and you don't hit aqua. This clay is so impervious that it would take 60 years for the water to get to the groundwater table. It just doesn't happen here.

MR. STOEPKER: Obviously the comments regarding culture characteristics speak to themselves. Nor were there any historic issues that was an issue [45]that was potentially rated by the state department. They sent correspondence in to the department saying there was nothing there.

One of the other issues that was raised had to do with the loss of pollution characteristics or control of the wetland that is there, and potentially looking at what was being proposed, and, Bob, I don't know if you could comment on that.

MR. LEIGHTON: This storm water system is not detailed out to the point it would be in final state plan approval. In fact, back then I think retention ponds were probably less sophisticated than they are now. The only real impervious surface you have to worry about is this paved surface. The rooftop water is clean. You could take that and let it run across the open space and wherever, because that is relatively clean water. What we do with the paved surface, which is minimal by the site. This is a few driveways and a small

collector drive that goes out to an entrance. That is broken down into fairly small water sheds typically which puts a grease and oil trap in the bottom of the catch basin. I have seen studies where they claim that takes nearly 90 percent of the impurities out of the water. It then goes – this would be designed a little bit different now because we [46]have gotten more sophisticated. What would happen, rather than going into one individual basin, which is diagramed on here, it is likely we would be required to discharge into what is called a first flush basin. It is a small capacity holding pond that has the first amount of water and attempts to take out whatever impurities are there that the catch basin doesn't pick up. From there it would overflow into actually a retention pond, would have some slope to it, and during normal flows would be sort of a very circuitous pattern that would be full of vegetation. The bottom line would be from the inlet structure to the outlet structure. The attempt would be to make the water travel a great distance and a lot of vegetation before it is discharged out into the drain.

As I said in this case, we are taking that filtered water then out to the drain. A lot of times what we'll attempt to do is actually take this roof water and not introduce it into this drainage system. This has a better opportunity to deal with the water that has some pollutants in it, and we're not wasting the storage capacity and clean water.

More recently we have been trying to take our roof water directly over to a mitigation basin or even discharge it to the drain after it goes to a small [47]basin to slow the velocity down. So this looks pretty simple here. This system would be pretty

sophisticated, at least in terms of what we know today. The pollutants, I would venture to say, would not be a measurable issue in this whole watershed or the Great Lakes System. I don't think it would even measure on the scale.

MR. GAUTHIER: One thing, something that has troubled me, what is actually going on in the areas between your buildings and this? Is this fill?

MR. LEIGHTON: It would be a preservation area. That would all be treed.

MR. GAUTHIER: This is not a building or asphalt, it's forest.

MR. STOEPKER: They actually have a woodland ordinance in Chesterfield. There is a penalty or a fine or whatever that has to be paid. There is a woodland preservation ordinance within the Township that would be applied to the development, so to the extent that we can, we would.

I mean we would, because there is a financial penalty to the removal of trees. To the extent you remove the trees there is a replacement requirement. There is a DBH formula.

MR. LEIGHTON: Everybody is different.

[48]MR. STOEPKER: Which Maher alluded to, there is a DBH you take out. There is usually an excess for the DBH that you removed that you have to replace.

MR. LEIGHTON: The disturbed area would end up

being reforested. I know it would take a few years, but over time this area again would come back as a canopy.

MR. STOEPKER: That is why we had given the other alternative. If they said we would prefer to just leave the tree canopy the way it is, don't touch that and don't touch this here, okay, fine. But in our discussions with them it seemed like the enhancement concept, because it retained some tree canopy, but also created diversity which the site lacked. It just seemed the more prudent site and a prudent alternative, and also from connection into the drain, it seemed like it was an improvement over just the preservation element. It goes beyond what your question was, but there is a treed ordinance that says we have to preserve as many trees as you can.

MR. GAUTHIER: You would none the less be re-grading the entire site.

MR. LEIGHTON: The grading limits would be basically behind the building. This could be graded or not depending on how the agency feels.

[49]MR. GAUTHIER: Did we ever get an acreage figured for the building ordinance?

MR. LEIGHTON: We did a quick calculation and it looked like the 3.74 was the whole open area. But visually that doesn't look accurate, but we figured out that the property line goes from the center of the road.

MS. CHUBB: So you're going to be grading out to the property line here, but then you have to replant trees in this area.

MR. SEIBER: Because the silt fence is here, it doesn't necessarily mean that trees within that area would be coming down. They would be selectively saved as the grading allows, but the siltation fence following the property line.

MR. LEIGHTON: I have developers that actually extend foundation down to get back to grade. You do very little grading around the exterior of the building. You sort of vary the foundation to fit the land. You can save trees pretty close to the units if you do that. Then if you use –

MR. SEIBER: Down here I think we tried to hold ten feet off the building.

MR. LEIGHTON: Yes, you have to get back down to the scaffolding.

[50]MS. CHUBB: Was the district aware that the applicant was agreeable to leaving instead of doing enhancement? It seemed like in the report you focused on either the enhancement or something else. I didn't see the other option.

MR. DEROCHE: I did not know that was an option they were considering, because of the state process that had already been gone through.

MR. STOEPKER: What we did is we said here, these are two alternatives. We will do either one of these what you deemed to be best, and they concluded enhancement was best and we –

MS. CHUBB: They?

MR. STOEPKER: Being the state. Right through the administrative law judge, and I feel that in our preliminary discussions they thought enhancement was best, but they were thinking in minds of mitigation ratios, like traditional mitigation ratios.

Judge Patterson I think concluded that it was best. We're not wedded to either scenario and that is why we threw them out. Either preserve it the way it is, and the plan does say preservation, which means preserve, don't touch, and then to verify that, certainly we would put that in a [51]conservation easement, which we proposed anyway, that it would go in a conservation easement which would prevent that from ever being built upon, and then a conservation easement in the form of preservation.

MS. CHUBB: Is that an option at this point given what the state ruling, the judge's ruling was for the enhancement? Aren't you tied to that now?

MR. STOEPKER: I think that if this department were to say that it preferred preservation, that is why I hate this whole thing. Everybody should sit down and go through this whole procedure at once. My feeling is, I can't speak for the department, but I would think that if this department felt that preservation was the better route to go, I don't see them disputing that concept. Bob, do you?

MR. LEIGHTON: I doubt it.

MR. STOEPKER: And we didn't care, we were just trying to be proper in our thinking and that is why we gave two alternatives. And I can see why, Bob, you

thought with the one because that was what approved.

MR. DEROCHE: What was given to us?

MR. STOEPKER: We presented to the state though in that trial both alternatives. We advocated both and tried to point out the benefits of the two, so we advocated both to them and said you decide. One [52]being more costly and we knew that.

MS. CHUBB: I had some questions specifically on the issue you raised in the request for appeal that I wanted to get through.

MR. STOEPKER: Just go ahead.
MS. CHUBB: I don't know if –

MR. STOEPKER: There was some constructional and operation impact issues, water runoff storage points that were raised. Again these were marginal things, but we wanted to address them to make sure.

We oversized certain things on purpose because of those potential issues and we just wanted to clarify that. Why don't you go ahead and ask you questions and maybe it is covered.

MS. CHUBB: Okay. Well, I just want to understand how you have worded these appeal reasons so I can make an accurate recommendation to the General.

On the first one which deals with the jurisdiction over the land. We have no jurisdiction over the land is what you stated here. Is that pertaining strictly to the wetlands or also the ditch or you're not thinking about

the ditch because there is no work in that area or how?

MR. STOEPKER: I -

MS. CHUBB: How far are you taking that [53]statement?

MR. STOEPKER: My position is if I look at the statute and the rules, the Federal Government doesn't have jurisdiction over this site because it is not - it is an isolated parcel. It is not next to a navigable stream. It is not adjacent, which is part of Interstate Commerce when you go through the regulations, and if you were to include the stream, which we are not doing, is not within our jurisdiction. We don't know. I mean if the county came to us and said clean up the drain, I guess we would have to clean up the drain, but our intention is we would stay out of drain.

MS. CHUBB: Do you consider the drain a water of the U.S.?

MR. STOEPKER: No, I don't think it is a water of the United States, not within the definition of the statute. I don't think so at all.

MS. CHUBB: Nor the wetland being regulated because it is isolated. That is the major issue.

MR. STOEPKER: Yes, that is why I asked about the migratory bird rule. If you look at the regulations of the wetland, which falls within the statute, I don't see the corollary. I don't see where it is. That is when Mr. Cauthier used the term tributary. That is a [54]new one to me. You are always learning.

Our position is no where under the statute or rules can you find an access that falls under the jurisdiction even if you include the drain.

MS. CHUBB: Because of the berm?

MR. STOEPKER: Even if you include the drain, the drain was – first of all, it was not created by the United States. It was created to drain land in Macomb County for flood control. It is under the jurisdiction of the County Drain Commission.

The is other issue, this is not even a flood plane.

MR. LEIGHTON: The drain commissioner can come in here and clean that out any time he wants to.

MS. CHUBB: When that drain was created what was the character of that land? Was it all wetland at one time.

MR. LEIGHTON: If you believe scientific theory, this was all under the Great Lakes at one time.

MS. CHUBB: I wasn't going to go back that far.

MR. LEIGHTON: If you believe scientific theory.

MS. CHUBB: Before the houses got there, before the drain was put in, what was there? Was it [55]wetland?

MR. LEIGHTON: It is that. Most of Southeastern Michigan was wetland, but I don't have any photographs or survey that verify that. I mean that is what the scientific theory is. I think I tend to believe

that. What normal wetland, my guess is it was probably more emergent at that time. You have to figure that drain dropped the water table three, four feet, so it has been a long slow drying out process, and I'm not so sure that that process isn't continuing today, because the lake levels are down five feet. Whether that will reverse itself and go the other way. You have people saying that is not normal. What is normal? In what context are you going to put this thing.

What happens if those lakes drop another two feet. I mean there is lots coming up on the thumb area. There is a judge up there that owns a big piece of land. He just picked up six lots that used to be wetland, because the lake level is down five feet, so what was wetland is no longer wetland.

MR. STOEPKER: Going back to your question, I'm going to take the definition out of the CFR. This is what is called interstate water. The term water of the United States, because that goes back to the [56]question of who has jurisdiction of the drain. The term waters of the United States means all waters which are currently used or were used in the past or may be susceptible to use in interstate or foreign commerce.

MS. CHUBB: Isn't that navigable water?

MR. STOEPKER: No, the term waters of the United States.

MR. STOEPKER: Then you get into. Then if you look at.

MR. DEROCHE: CFR328.3A3, waters of the United States is defined as quote, "waters such as intrastate lakes, rivers, streams, including intermittent streams, mudflat, sandflats, wetlands, sloughs, prairies, potholes, wet meadows, playa lakes or natural ponds, the use, the degradation or destruction of which could affect interstate or foreign commerce including any such water.

MR. GAUTHIER: And that is part C?

MR. STOEPKER: Yes.

MR. STOEPKER: But I focused in on the wetland section of the wetland as opposed to ponds. That case dealt with a pond. If you apply that definition of waters, it says all interstate waters including interstate wetlands, and then it kind of uses that same definition. All other waters such as [57]intrastate lakes, rivers, streams, including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairies, potholes, wet meadows, playa, P-L-A-Y-A lakes, or natural ponds. The use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters.

And then they go into these other ones which I started reading, could be used by interstate or foreign travelers for recreational or other purposes or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce or which could be used for industrial purposes by industries, otherwise defined as waters of the United States.

And then it talks about tributaries identified in

paragraphs S1 through 4, and then you get into the territorial. I mean I read that and it is not there. So at any rate –

MS. CHUBB: Then, issue number two, where you talk about the res judicata issue which is – as I understand this, even though the state decision specified that it was strictly under the state law, this latin term or whatever it is.

MR. STOEPKER: Res judicata?

MS. CHUBB: Right.

[58]MR. STOEPKER: I was never good at the Latin terms either.

MS. CHUBB: Explain what this issue is?

MR. STOEPKER: It is a legal issue as opposed to a factual analysis that this would have gone through. As you.are aware, and everybody can correct me if I'm wrong, there are two statutes within the United States pursuant to the compact within the Federal Government and the sate. administer, both the state and- federal statutes and regulations pertain to the regulations of wetlands, Michigan and New Jersey, am I correct so far?

MR. GAUTHIER: Yes.

MR. STOEPKER: In that process if one reads the compact, and I think it is actually is called a compact between the State and Federal Government, they arecharged to do so, so they are acting on behalf of the

Federal Government and the State, and the purpose of that was to allow a uniform system in applying for a permit, so one wouldn't have to go through what we're going through here.

In other states I'm assuming you would go through the federal procedure and you wouldn't have to deal with different agencies, but nevertheless the intent here was to take it through one, and the permit [59] process in this case requires that by law that the permit application be copied to and forwarded to the EPA as an agency, administrative agency on behalf of the Federal Government.

So it is my position that once that process has occurred and you now have a trial on the issue and these are the exact same issues, the issues that are raised here are not different than are raised at the state process. Res judicata means it is done, you can't litigate or decide the issues again once it has been determined.

One would say since the Army Corp, the Federal Government was not at that table they are not bound by that decision because they are not a party to that case specifically.

My position is they were through this compact, because the state is acting on behalf of the Federal Government in administering these statutes and regulations, but that is not something Mr. Gauthier or Mr. Deroche would have gone through in their analysis. It is a legal position.

MS. CHUBB: I just wanted to make sure. Then our office Counsel can read the transcript and respond

more so than I would.

MR. STOEPKER: That is the position.

[60]MS. CHUBB: Okay. Number three, that is kind of what we have been going through, which it is a substantive issue of the review.

MS. CHUBB: Point by point disagreeing things that were stated.

MR. STOEPKER: It is the substantive review of the wetland analysis.

MR. STOEPKER: Did you have anymore questions on that?

MS. CHUBB: No. I just wanted to make sure that I understood what your appeal issues were.

MR. STOEPKER: We'll try to move this along. One of the comments that were raised on page six was the impact of the lake on the drain. And I guess I didn't understand that comment, but whether or not somehow Lake St. Clair impacts that drain and –

MR. DEROCHE: What we were saying was that, and what I was saying I should say in my document here was the when something – the Corp of Engineers jurisdiction or section ten, water goes to the furthest extent of the impact of the ordinary high water mark of the lake.

It is my belief that elevation, that ordinary high water mark elevation goes upstream to a certain point, and

that I believe that influence is still at [61]this location, that this elevation is likely – the elevation of Sutherland-Oemig Drain, which is this wetland is adjacent to, is within the influence. So I was making a point for adjacency to a section ten water.

MR. STOEPKER: Was it documented? What is the lineal distance from the lake to the site by drain.

MR. DEROCHE: I don't know what it is.

MR. STOEPKER: Is it miles?

MR. DEROCHE: I'm not sure.

MS. CHUBB: He is using a water elevation.

MR. STOEPKER: He used an analysis in the report of the Salt River which is a mile away from Lake St. Clair.

MR. DEROCHE: Salt River is a mile away from this site or a little over a mile away from this site, and although that is a bigger river, we take jurisdiction up to 23 Mile Road as far as the influence of Lake St. Clair.

MR. STOEPKER: On the Salt River?

MR. DEROCHE: On the Salt River.

MR. GAUTHEIR: If you imagine Lake St. Clair at a lake stage or a level and that is equivalent to it is ordinary high water mark it is established contour that spreads across the landscape wherever it may go. [62]All the tributaries of Lake St. Clair have within their reach that elevation contour along its banks for

some distance, because it is such a flat landscape so it may be based upon contour lines where the high water mark may stepped very close, if not adjacent to that area.

MR. STOEPKER: You haven't looked at any of the objective data which shows that?

MR. DEROCHE: No, sir.

MR. STOEPKER: So it is just a guess on your part?

MR. DEROCHE: Right.

MR. STOEPKER: And the concern would be then the water runoff that goes into Lake St. Clair effects lake elevations, lake clarity.

MR. DEROCHE: Yes, all of those things.

MR. STOEPKER: That fits into what we were going to talk about next. What about lake elevation, the concern would be water runoff from the site which would result for a potential fluctuation of water level in addition to water clarity.

MR. DEROCHE: More so and the drainage system that leads down to the lake proper, if you will. Realizing this site is only 20 acres, that it has a potential to store precipitation in large storm events and hold the precipitation rather than having it being [63]released to that tributary system that eventually goes to the big body of water, Lake St. Clair.

So the impacts that we're talking about are again on not

that 20 acres, but as they impact that tributary system and down to the lake, whether it is added sediment, pollutant, added water volume.

MR. STOEPKER: Bob has talked about pollutants. Maybe you can talk about, Clif, we did consider that issue in designing the form water retention system here. Knowing also that this site, the only water it does contain is the precipitation from the rain going to the site, I don't think there is a dispute on that but –

MR. SEIBER: The Township has requirements for storm water retention or storage and characteristics for the site, and this pond is sized for a hundred year storm and the runoff rate is .2 feet per second.
MR. STOEPKER: Can you tell us what that means in English?

MR. SEIBER: It means that the runoff end, the developed condition is about half of what the present development runoff is. So the pond is sized for 100 year storm or, in other words, a storm that theoretically has a one percent chance of occurring in [64]any given year. There is plenty of capacity and that also assists in removing sediment. That helps in the water quality issue too.

MR. STOEPKER: Are there any other features that are built within the system that address a sedimentation issue?

MR. SEIBER: Of course during construction there is catch basin filters provided on all the catch filters as well as a siltation fence that is maintained during the course of construction

As Bob mentioned the grease drains and for base and different items of sediment control which are incorporated as part of the storm water basin and storm water management system.

MR. STOEPKER: So from the flooding impact?

MR. SEIBER: Actually I think it would reduce the amount of flooding. The rate of flow in this county drain would be reduced after development, because this area is dug out and additional storage capacity is provided, which more than compensate for the additional impervious surface.

MR. STOEPKER: Because it exceeded the amount that is required to do that because of the 100 year floor requirement.

MR. SEIBER: And the restricted outflow [65]rates.

MR. GAUTHIER: Part of our point was right now there is no outflow. Essentially it is off-line, if you will. Once you do anything to connect it, it would be online, therefore, that will get into the drainage basin.

MR. SEIBER: I'm not sure you can say for the hundred year storm or ten year storm for that size storm event you would have no flow into that drain. We saw some low areas that kind of meander through and seem to make their way over to the drain once you had some fill in of that low area, so you get a three and a half inch storm, which would be a ten year storm. I think you would start seeing some overflow.

MR. GAUTHIER: Because it is not –

MR. STOEPKER: Right, there is not, whether they were manually created or not or hand dug there was lateral cuts, drainage cuts that run through that berm, and I think Clif's comments were right, you would have to get rain and it would have to go over that elevation. I notified three of them at least at the point where we walked and started going north on the site and I can't recall what is site.

MR. STOEPKER: The other question goes back to Bob, and that is the issue to the effect of water [66]quality. He talked about an anti-pollutant thing. One of the issues you don't have and that is somebody using fertilizer and other things, and Bob was involved in a project that was called Blue Herron which has won awards. I actually work for that association now, and we have a issue there where the neighboring lakes are taking away the lake level because of what they did and shouldn't have done. And to rectify that problem, we're going to have to connect the lakes.

MR. LEIGHTON: That was actually a required thing by the permit.

MR. STOEPKER: The problem we have with that, we have a restricted covenant at this condo association where you cannot use fertilizer and other lawn chemicals anywhere there and if that is a restrictive covenant that the department felt and we believe would be a valuable covenant to have. We would put that covenant in effect. And I raise this other development is now the other development upstream from us is not subject to those same restriction, and our concern is having their water come into our lake which is not subject to their restrictions, we're sensitive to that

issue. In fact, that is why I picked Bob to work with us on this project because he is from a pollutant standpoint that would be a potential pollutant and we [67]would put a restrictive covenant on the sale of and the development of the property, that you could not use those types of chemicals on the land. Not wetlands, whatever measures we could put to filter that out, that would go into the drain. If it is a restrictive covenant within the land, I mean that is recorded, everybody sees that and everybody that buys the units buys into that. At Blue Herron it has not deferred anybody from buying those units. They sell for a tremendous value.

MR. LEIGHTON: Those rules are really a marketing plus.

MR. DEROCHE: I wish they would do that in my neighborhood.

MR. STOEPKER: We view it that way, and so we're not just throwing that out there saying we think that would work. We know it works. We have done that and we would do that here. I think there was some questions raised about construction issues. One had to do with soil erosion. I think your response to that was you would dig – you would talk about that real quickly. This is during construction.

MR. SEIBER: One of the first things that would done is to install the siltation fence around the perimeters of the site, and once the mass grading [68]commences, this area would all be dished so that is generally drops toward the pond, so that during constructions any soil erosion of the ground surface would tend to drain towards the center and not drain out towards the

county drain, so just the method of construction would provide some assurance that erosion is maintained on the site and not allowed to release offsite.

MR. STOEPKER: That would be in addition to the silt fences that you would put up.

MR. SEIBER: Yes.

MR. STOEPKER: And that is also required by county permit.

MR. SEIBER: Yes.

MS. CHUBB: Bob's note here to me was that he reserved the room for only 15 more minutes. I don't know if there is someone waiting to use the room.

MR. DEROCHE: I know there is other people that have to catch buses today. I'm okay, but just to let people know.

MR. STOEPKER: In reference to there was a comment to page nine about the operational impact which talked about the restrictive covenant. We talked about the storm water issue. We talked about the filtration issue which does not exist now, but if you put in an [69]enhancement plan a filtration system could be installed through that.

There was a question raised about the potentiality of this as a sediment basin. It doesn't function as that now. Let's propose.

MR. LEIGHTON: Where the berm would be taken

away.

MR. STOEPKER: You would have to alter the topography of the property to do that.

MR. LEIGHTON: Without looking at the watershed, I'm not sure that would happen. Standing out there it didn't look like the drains gets that much water. If you take the upstream water and somehow capture it on the site. First of all, I don't know if there is that much water, and whether or not it ever would go over the edge of the ditch to go onto the property. I doubt it.

MR. STOEPKER: I think on page 12 of the report this gets into under the issue of biological, and I'm going to skip the points that are conceded. On page 12 it gets into this aquatic biota, and I think the issue was raised there, the potentiality for duckweed was mentioned. I don't think we have seen that on the property. There is no fish or shellfish on the site. The habitat to the extent exists as I think [70]is identified on the photographs. The understudy is largely in the upland which is non regulated, and the balance of the habitat is basically the tree canopy, and you can see that as you walk the site today.

They raise the issue of noise. He was kind enough to tell me that Indiana bats do exist near the Indianapolis airport. If they do exist and like our trees, the existence of human voice, which probably will compete with freeway noise, which would be fairly loud, I wouldn't think that would be a negative impact.

Again in reference to the habitat of the tree coverage, we'll abide by the Chesterfield Township ordinance in

reference to that, and whatever is taken down will have to be replaced in kind. Again the objective is to preserve as much as we can.

That then gets us to this last page, second to last page, page 25, and before we comment on that, it looks like there is nine categories that are summarized here, is that correct, and of the nine categories the conclusion by the department is that we satisfy six of them, is that correct?

MR. DEROCHE: That's correct.

MR. STOEPKER: And where we don't satisfy out of the nine is one, two and nine, and the first one [71]being the applicant must overcome the presumption that a practicable, less environmentally damaging alternative site, outside special, aquatic sites, exist. And I think the comments we made in the beginning is that is, in fact, the case. There is not a practicable alternative site that is available to do what we want to do. And when I'm not doing this kind of work, I do rezoning work. I could spend my entire life doing that.

If you go through the report, most of the environmental comments were, I'm paraphrasing, were marginal impacts. There was no significant impact. If you go through the environmental analysis under this, if you go to figure three, the discharge must not violate state water quality standards or Clean Water Act. They agree with us. The project must not jeopardize the continued existence of an endangered species. They agree with us. The [72]project must not cause or contribute to significant adverse effects on life stages of aquatic life and other wildlife dependent on other

ecosystems. The project must not cause or contribute to significant adverse effects on ecosystem diversity, productivity or stability. The project must not cause or contribute to significant adverse effects on recreational, aesthetic or economic values. They agree with us.

So the odd thing to me if you go through these things which points specifically to the environmental considerations of the reports and you apply that to one, I don't know how the conclusion then reads in one, there there is less environmentally damaging alternative site, when the environmental analysis that is described doesn't seem to be negative.

MS. CHUBB: Do you understand why significant has astericks?

MR. STOEPKER: If project does not comply due to this, explain if this determination differs from conclusion regarding EIS, Section IV, above. So there is a footnote down here, and the way I read it, if the project does not comply they would tell you that.

MS. CHUBB: If it is considered significant that triggers an EIS, that is what these questions are getting at.

MR. LEIGHTON: This is really a test for EIS do you understand that?

MR. GAUTHIER: It is also a test called for [73]significant degradation of the economic system.

MR. STOEPKER: I understand through my comments, if you read the report the term marginal is used all the

way through, of marginal impace.

MR. STOEPKER: Which report?

MR. DEROCHE: It is either minor or major.

MS. CHUBB: On an individual basis, and this also talk about cumulative.

MR. STOEPKER: Talking about cumulative, that issue did come up at the state hearing and Mr. Horning (phonetic) was asked to give a percentage of wetlands that had been built in the county versus wetland that was there and he couldn't do it.
MS. CHUBB: Wetland that had been lost?

MR. STOEPKER: Lost or whatever. There has been no study that he was aware of, at least at the time we identified cumulative impact.

MR. LEIGHTON: I think it is going the other way, to be honest with you. It is getting harder to find property that is not wet, and the less farming that goes on – I'll tell you what you can do. You can go out and map the sewer lines by the farming. There is a lot of violations out there, but that is not a whole a lot of permits. Especially in Macomb County, there is violations everywhere. You have one down the [74]street there. I saw a huge one. I think it is a function of the process.

MS. CHUBB: What is? I didn't follow that whole thing.

MR. LEIGHTON: If you are losing wetlands, it is because of the difficulty of the process. I think that where there aren't sewer lines and where development

pressure isn't heavy or high, it is not a proper location of development. The land is reverting to wetland. There is a gain out where the pressure doesn't exist.

MS. CHUBB: It is a reversion back. It was there, it was drained and then –

MR. LEIGHTON: Your percentage is calculating as being a loss. I don't think it is. I think it is coming back. Large acreage is reverting back to wetland. Where the loss is, is where either the law is not being followed or somehow people are slipping through the cracks or something, because the loss is where the sewer lines are and the developments occur, and the percentages you're quoting are wrong.

What you should do if you want to get a good percentage, is go out and add up all these areas of development. There is your loss. Everywhere else you're getting a gain.

MR. STOEPKER: [75]Going to item number two, there must be no alternative that is practicable, is less damaging to the aquatic ecosystem, and has no other significant adverse environmental effects. I note there is no asterick after that word significant, but we believe that what we have submitted both to the state and to the department shows that there is no practical alternative, and that, in fact, what we have proposed is not damaging to the aquatic ecosystem as it relates to this property and environment surrounding that property, and that either the enhancement or preservation alternatives meet clearly the objective of the statute and the regulations that have been adopted pursuant to that statute.

And then you go down to paragraph number nine, which is the only other one we received, all appropriate and practicable steps to minimize potential adverse effects of the discharge on the equatic system must be taken.

I think we have demonstrated that. I think what we're proposing goes to the heart and soul of at least that particular paragraph, that that is the intent – that that would be the intent of this development. That is why the preservation enhancement plans were shown, the concept of restricting the use of [76]fertilizers and that on the property, on the site, minimizing the actual grading plan, grading area to what needs to be done, the methodology constructing the plan, the oversizing of the retention pond area. The method of using the retention ponds on the site, the segregation of that from the enhancement areas of the preservation areas on the site all were done with objective of minimizing potential adverse impacts.

When you gauge that versus the nature of this particular wetland, forgetting what is around it for a minute, and that everything else is built around it, you know this is certainly, if you were to do an essential, non essential analysis of this wetland, this would fall under a non essential wetland. We think we're talking about a non essential wetland and making it better in one sense, making it function as more of a filtering wetland if the enhancement plan is actually adopted, and that is the reason for its suggestion while environmental features in the environment that meet the objectives of the statute and regulations. I mean that kind of summarizes it in a nutshell.

MS. CHUBB: You said it was a non essential wetland. How are you defining that?

MR. STOEPKER: Actually the State of Michigan within the statute, there is an essential, non[77]essential analysis that is done where you actually grade a wetland, and actually they didn't do it. We did it. They didn't do it. It was brought out. They are supposed to do that when the state does an analysis.

MS. CHUBB: As part of their application process?

MR. STOEPKER: Bob, I think you'll notice I asked them a lot of questions on it. They have a checklist-of things that they are .supposed to go through that match the stats, and it is kind of like getting the letter from the Fish and Wildlife Department, and they have not inspected the site, you know, and just making a general conclusion that this is a valuable piece of something even though they have never been here, which is what they did in this case, twice.

You know, we did not just a. cursory review, an in-depth review. It has been pending so long. If you would apply the essential, non essentially tasks, which is not found in the federal statute but it is found in the state statute, it is not an essential wildlife. I think under the enhancement plan it would be essential characteristics them so -- My voice is done.

[78]MS. CHUBB: Anything else? Last comments? Okay then. I didn't have any further questions so --

MR. STOEPKER: Bob, for the record, did you have the photocopies of these? Did you have black and whites of

these or not?

MR. DEROCHE: I have my own.

MR. STOEPKER: These were referenced in the transcripts, these photographs, but whether he had the specific ones, I can't recall, and I don't know if you want these or copies made of those or not?

MS. CHUBB: I have copies of what pictures he has.

MR. DEROCHE: Which basically show the same thing.

MR. STOEPKER: I just wanted to be clear that we were not trying to offer something that had not been referenced before.

MS. CHUBB: In terms of the site, the site is the site, unless it has been clear there is some sort of violation and then over time, over time changes, and it doesn't change in the process so

MR. STOEPKER : All right. I thank you for your time. I appreciate it very much.

MS. CHUBB: Thank you.

MEETING RECORD

FILE NUMBER: 99-250-002-1

PROJECT NAME: CARABELL CONDOS

MEETING DATE: 30 January 2001

MEETING TIME: 1:30 p.m.

MEETING PURPOSE: Appeal Conference

MEETING LOCATION: Planning Conference Room PVM Federal Building, Detroit

ATTENDEES	TITLE POSITION COMPANY PHONE
Suzanne Chubb	Division Appeal Review Officer .
Keith Carabell	Applicant
Tim Stoepker	Attorney for Applicant
Bob Leighton	Environmental Consultant for the applicant
Cliff Seiber	Engineer for the applicant
Wally Gauthier	Detroit District Regulatory Section B Branch Chief
John Ritchey	Detroit District Personnel - Observer
Pat O'Connor	Detroit District Personnel - Observer
	Bob Deroche Detroit. District Project Manager Section B
Court Reporter	

MEETING NOTES/SUMMARY: Purpose of meeting was to clarify record so the Division Review Officer could make a decision on the merits of the three points

of appeal put forward by Mr. Stoepker on behalf of Mr. Carabell. Mr. Stoepker made a presentation on the points with particular emphasis on the third point: a permit should be issued to the Carabells. He basically presented his argument, in the form of court transcripts, taken from the MDEQ contested case hearing before the state administrative law judge. Mr. Stoepker contends that no permit is required, from either state or federal agencies, and that the Corps is prohibited from making a decision when one has already been made by a "competent court".

The RO gave a timetable of March 4, 2001 for returning a decision on the matter.

ACTION REQUIRED: None

NAME OF PERSON DOCUMENTING THIS MEETING: Robert D. Deroche

SIGNATURE:

DATE: January 31. 2001

MEETING RECORD

FILE NUMBER: 99-250-002-1

PROJECT NAME: CARABELL CONDOS

MEETING DATE: 30 January 2001

MEETING TIME: 0900 hours

MEETING PURPOSE: Appeal Site Visit

MEETING LOCATION: Donner Road - Site of Project in Chesterfield Township

ATTENDEES	TITLE POSITION COMPANY PHONE
Suzanne Chubb	Division Appeal Review officer
Keith Carabell	Applicant
Tim Stoepker	Attorney for Applicant
Bob Leighton	Environmental Consultant for the applicant
Cliff Seiber	Engineer for the applicant
Steve Gallop	Representative of Congressman Bonior's Office
John Ritchey	Detroit District Personnel - Observer
Bob Deroche	Detroit. District Project Manager

MEETING NOTES/ SUMMARY: The party walked along the upland ridge that runs along the ditch along the northeast/southwest hypotenuse of the triangular-shaped property and was. created as a result of the excavation and sidecasting of the ditch materials. There

was some discussion. as to the observations that there is little in the way of understory except along that upland ridge and on the upland corners of the property, as well as along the perimeter of the woodlot. There was also a discussion as to which direction the drainage ditch flowed. I stated that on one of my visits when there was water standing in a portion of the drain, that it was flowing into Sutherland-Oemig Drain. Bob Leighton said he thought it drained the other direction. Upon studying the site plan map which Suzanne brought, it was determined that it depended on where you were at in the drain, as the elevations are inconclusive. I offered, however, that typically, a drainage system goes from smaller to larger and if you looked at the other end of the drain, I believe it goes into "nothing", perhaps draining a farmfield; whereas, if you looked at the other end; it goes into S-0 drain. We concluded the meeting at 0945 hours.

ACTION REQUIRED: None

NAME OF PERSON/DOCUMENTING THIS MEETING: Robert D. Deroche

SIGNATURE:

DATE: January 31, 2001.

MEMORANDUM FOR: ADMINISTRATIVE APPEAL CONFERENCE

FOR: KEITH & JUNE CARABELL, FILE NO. 99-250-002-1 DETROIT DISTRICT

DATE: JANUARY 30, 2001

Review Officer (RO): Suzanne Chubb." U.S Amy Corps of Engineers; Great Lakes & Ohio River Division, Cincinnati, Ohio

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226-3425.

Receipt of Appeal: December 4, 2000

Location of Appeal Conference: McNamara Federal Building, 477 Michigan Avenue, Detroit, Seventh floor conference room.

Attending Conference:

Mr. Keith Carabell, appellant
Mr. Timothy A. Stoepker, appellant representative
Mr. Robert Leighton, wetland consultant
Mr: Clif Seiber, engineering consultant
Mr. Robert Deroche, Project Manager, CELRE-CO-L, Detroit, McWgan
Mr. Walter Gauthier, Section Chief, CELRE-CO-L, Detroit, Michigan
Mr. John Ritchey, Indiana bat expert, CELRE-COL, Detroit, Michigan.
Mr. Patrick O'Connor, observer, CELRE-CO-L,

Detroit, Michigan
Ms. Suzanne Chubb, Appeal Review Officer, CELRD-CIA-0, Cincinnati, Ohio
Ms. Luey Capobianco, stenographer

Basis for Appeal:

Reason 1: The Army Corps of Engineers (Corps) has no jurisdiction over the land at issue.

Reason 2: The issues presented by the Carabell's petition were already decided by the Michigan Department of Natural Resources in favor of the Carabells, so the Corps is barred by res judicata from deciding against the Carabells.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Note: A site visit was conducted on the morning of 30 January 2001. The following individuals met at the site at 09:00 - Messrs. Carabell, Stoepker, Leighton, Seiber and Steve Gallop (asst. to Congressman David Bonior) were present for the appellant;

Messrs. Deroche and Ritchey represented the Detroit District, and myself. Mr. Carabell did not walk the site with the group.

The group began at the SW corner of the parcel, walked along the ditch to the NE corner of the parcel and then in a westerly direction to return to Donner Road. Mr. Leighton said the ditch is a man-made county drain of unknown age (perhaps fifty to sixty years old, 1940-50

timeframe). The group discussed the direction of water flow in the ditch. Mr. Leighton believed it flowed SW; Mr. Deroche observed it flowing NE during a site visit and also remarked that he thought the drainage is more "feathery" (diffuse) to the SW. A review of the spot elevations on Sheet 1, Grading plan of the project drawings, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the SW property corner is 584.50 feet U.S.G.S. datum and 584.40 feet at the NE corner. The lowest elevation is 583.90 feet, noted at two locations along the ditch northeast of the midpoint along the property line. The County Drain Commissioner's office may have the original specifications of the ditch design or road culvert invert elevations at Donner Road and the NE end to clarify this issue. Neither Mr. Leighton nor Mr. Deroche had checked on this information. The ditch may also drain in both directions if it traverses two different drainage areas or watersheds.

Conference Discussion:

The appeal conference was held between 13:35 and 15:40. After introductions, I briefly explained the purpose of the appeal conference and the appeal review process following the conference. The appellant made the following points pertaining to the aforementioned Request For Appeal.(RFA) reasons:

1.) The appellant considers the wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers. The

appellant also does not consider the ditch to be a water of the U.S. Mr. Stoepker requested the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable water. Mr. Gauthier responded that the subject wetland was adjacent to a surface tributary system to a navigable waterway (Lake St. Clair). The District did not rely on the Migratory Bird Rule. Mr. Stoepker requested the CWA citation for tributaries to navigable waters.

2.) Legal issue refer to stenographer's verbatim record. The appeal reason stems from the appellant's belief that the State of Michigan, while administering the 404 program, was acting on behalf of the federal government.

3.) Mr. Stoepker raised the following points under this reason:

a. Alternative project site (Corps letter dated 5 October 2000, page 2). The appellant investigated alternative sites within the township based upon the township's master plan and utilizing the current land zoning designations. Mr. Stoepker referenced the MDEQ contested case hearing transcripts of Mr. Patrick Meagher, planning consultant to Chesterfield, pages 157-212 (EA enclosure 14). Mr. Stoepker said Chesterfield is a built-out community meaning that the commercial and single and multi-residential areas are well established.

The appellant purchased the property in 1969, prior to Clean Water Act regulations. The site is mostly wetland. The District's letter states that "One apparent

less damaging alternative would be to purchase an upland or primarily upland, parcel of property elsewhere in the Chesterfield Township area that maybe zoned or re-zoned for multi-family residential development." Mr. Stoepker said that the District had no substantive basis for the statement since they had not conducted a study of possible sites.

In the hearing transcript for Mr. Meagher, page 166, Mr. Meagher started that, besides the project site, another undeveloped property was zoned RM-3 within Chesterfield township. Mr. Stoepker said his client did not consider this parcel in their alternatives analysis because it would mean "abandoning" the project parcel. The parcel would have cost $43,400 per acre to buy.

In 1993, the USEPA sent a letter to NIDEQ and objected to the project (130-unit proposal). A later modified proposal (112-unit proposal) was submitted to the state but not coordinated with the USEPA or CCE. A 106-unit ranch-style plan was also considered by the appellant as well as a 24-unit proposal suggested by the MDEQ.

Mr. Seiber summarized the eight different scenarios that the appellant considered in their 1998 feasibility-analysis.(EA enclosure 14).

Project Scenario	% Profit (+) or Loss (-)
112-unit condos w/offsite mitigation	- 2.26

112-unit condos w/ onsite enhancement	+ 4.79
106-unit ranch w/offsite mitigation	- 2.17
106-unit ranch w/onsite mitigation	+ 5.13
24-unit condos w/ offsite mitigation	- 16.24
24-unit condos w/ onsite enhancement	- 7.17
24-unit condos w/ offsite mitigation	- 13.8
24-unit condos w/ onsite enhancement	- 5.58

b. Mitigation, Mr. Stoepker questioned the 1.5:1 minimum mitigation ratio suggested by the USEPA (EA page 3) because there was no basis given for this ratio. He said that this ratio, when applied to 15 acres of wetland impact, is not prudent and feasible although it may be for parcels with less wetland impact.

Mr. Stoepker said the appellant is also agreeable to preservation of the remaining onsite wetland in-lieu-of the proposed enhancement mitigation plans. I asked the District representatives if they had been aware of this and they said no.

c. Wetland functions/values. Mr. Leighton spoke on his

assessment of the current wetland value. He said the onsite wetland lacks diversity and has an open understory. Understory can be found in the upland portions of the parcel. The wetland tree species are cottonwood, elm and silver maple which is characteristic of most of the forested wetlands in Macomb County. I asked Mr. Leighton if he knew what percentage of the County was comprised of various wetland habitats (emergent, scrub-shrub, forested) both historically and currently. He did not know.

Mr. Stoepker mentioned that a Public Notice consent letter had sated that the onsite wetland had a groundwater recharge function (EA page 4). Mr. Gauthier stated that groundwater recharge had not been a Corps issue.

Mr. Stoepker said the State had defined the wetland as "non-essential wetland" based on State statute/definition.

d. Water Quality. Mr. Leighton also spoke about aspects of the project design related to water quality -- onsite erosion controls during construction (silt fences and catch basins, disturbed ground sloped to drain to center of property). After construction, grease traps with storm water runoff from paved areas etc. directed to a storm water detention basin, not to the mitigation areas. The detention pond is designed for a 100-year storm event. The proposed enhancement areas would filter surface water runoff. The outflow to the ditch is 0.2 cfs, 50% less than the current runoff rate.

e. Migratory Bird Habitat. Mr. Stoepker said there was no demonstrated lack of avian habitat in the area or

that the area is vital to migratory birds.

f. Miscellaneous. Chesterfield township has a woodland preservation ordinance (reference Meagher transcript pages 209-211). The appellant is not opposed to banning the use of lawn chemicals within the development and placing deed restrictions on the remaining wetland. A ban on lawn chemicals has worked well at another existing development (the Blue Heron development).

Suzanne Chubb
Appeal Review Officer

ADMINISTRATIVE APPEAL DECISION
KEITH & JUNE CARABELL,
FILE NO. 99-250-002-1
DETROIT DISTRICT
MARCH 5, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Timothy A. Stoepker, Dickinson Wright PLLC, 500 Woodward Avenue, Suite 4000, Detroit, Michigan 48226X425.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): December 4, 2000

Appeal Conference Date: January 30, 2001

Site Visit Date:. Same

Background Information: The .appellant proposes to construct a 112-unit townhouse condominium development on a 19.6 acre triangular-shaped parcel located in Chesterfield Township, Macomb County, Michigan. A county drain follows the hypotenuse side of the property on a northeast-southwest alignment. A small amount of upland is located in the southwest corner of the parcel and along the ditch. The appellant proposes to place fill into approximately 15.9 acres of Wetland and convert approximately 3.7 acres of forested wetland to emergent and open-water cover

types as mitigation (enhancement).

Following Michigan Department of Natural Resources (MDNR) permit reviews in 1993 and 1994 with subsequent permit denials, a Michigan Department of Environmental Quality (MDEQ) administrative law judge ruled in favor of a modified project design in September 1998 and ordered the issuance of a State permit. The United States Environmental Protection Agency (USEPA) sustained their objections to issuance of a permit and, pursuant to Section 404(j) of the Clean Water Act and 40 CFR 233.500), Section -404 permit authority was transferred from the MDEQ to the Army Corps of Engineers (Corps).

The appellant subsequently filed an application dated 19 August 1999 with the Detroit District (District). The District published a public notice (PN) on 8 February 2000 and conducted three site visits on 12 October 1999, 5 May 2000 and 2 August 2000. Following the review period, the application was denied on 5 October 2000. The appellant submitted a RFA to the Division on 4 December 2000.

Summary of Decision: I find that this RFA has no merit. The onsite wetland is regulated because it is adjacent to a tributary system of Lake St. Clair. Further, under the Clean Water Act (CWA), the permit issuance decision by the MDEQ administrative law judge does not bar Federal review and jurisdiction. The District completed a fair and reasonable review of the appellant's application in accordance with all applicable laws and regulations.

Appeal Evaluation, Findings and Instructions to the

Detroit District Engineer (DE):

Reason 1: The Corps has no jurisdiction over the land at issue.

Finding: Reason 1 of this appeal has no merit.

Action: No action required.

Discussion: The appellant considers the onsite wetland to be isolated and therefore non-jurisdictional based on current USEPA and Corps regulations at 40 CFR 230.3(s) and 33 CFR 328.3 respectively and the recent U.S. Supreme Court ruling in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers. The appellant also does not consider the onsite ditch to be waters of the United States. The appellant requested that the Corps identify the section or provision of the Clean Water Act (CWA) that provides for Corps jurisdiction of wetlands not directly adjacent to navigable waters and for tributaries to navigable waters.

Under the Federal Water Pollution Control Act (FWPCA) amendments of 1972. (Public Law 92-504), Congress extended Corps regulatory jurisdiction beyond the traditional "navigable waters" to include "all waters, of the United States", including wetlands (33 U.S.C. 1362). In 1977, the FWPCA was further amended and renamed the Clean Water Act. Title 33 U.S.C. 1344 (also known as Section 404) requires a permit from the Secretary of the Army for, discharges of dredged or fill material into "all waters of the United States." The statutory authorities under which the Corps implements its regulatory program are found at.

33 CFR 320.2 and the policies, practices, and procedures followed by the Corps in connection with the review of permit applications to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 are found at 33 CFR 323.

"Waters of the U.S." include traditional navigable waters and their tributes, adjacent wetlands and isolated waters with an interstate commerce nexus. "Adjacent" means bordering, contiguous or neighboring and' includes wetlands separated from other waters of the U.S. by a man-made dike or barrier, natural river berms, beach dunes and the like (33 CFR 328). "Isolated waters" are defined as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies (33 CFR 330.2). A ditch excavated in a water of the U.S. (wetland or stream) remains a regulated water of the U.S. provided an Ordinary High Water mark is present. A ditch constructed wholly within upland is generally not a water of the U.S. (Preamble to 2000 Nationwide Permit Regulations, 65 FR 12823).

In this case, the District determined that the onsite wetland was adjacent to a surface tributary system of a navigable waterway, Lake St. Clair. Specifically, the project manager observed that the onsite county ditch flowed into the Sutherland-Oemig Drain, which flows into Auvase Creek, which outlets into Lake St. Clair. The ditch appears to have been excavated in wetland based upon the adjoining onsite wetlands and the identification of poorly drained hydric soils (Toledo silty clay loam, 0-2% slopes) by the U.S. Department of

Agriculture, Natural Resources Conservation Service (Macomb County Soil Survey, 1971). The appellant's wetland consultant delineated the ditch as wetland. Spoil material from the excavated ditch was sidecast into berets on both sides of the ditch. However, the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency as described above. Construction of the ditch is thought to have occurred some fifty to sixty years ago prior to CWA jurisdiction.

One confusing aspect of the ditch is the direction of water flow. The appellant's wetland consultant believed it flowed in a southwesterly direction away from the Sutherland-Oemig Drain while the District project manager (PM) observed it flowing northeasterly during a site visit. The PM also remarked during the appeal site visit that he thought the drainage was more "feathery" (diffuse, less defined) to the southwest. A review of the spot elevations on Sheet 1 of the appellant's grading plan, dated 12 August 1999, does not clarify the issue. The last bottom elevation of the ditch at the. Southwest property corner is 584.50 feet U.S. Geological Service (USGS) datum and 584.40 feet at the northeast corner. The lowest elevation is 583.90 feet, noted at two locations along the ditch northeast of its midpoint along the property line.

Although confusing, the appellant has not presented any information to refute the District's evaluation. Furthermore, even if h assume that the ditch flows in a southwesterly direction, the USGS topographical map, New Haven quadrangle, appears to indicate that the ditch is connected to other ditches that outlet to Auvase Creek and eventually Lake St. Clair. This decision does

not prevent the appellant from, presenting new information to the District for reconsideration of then original determination.

The District also performed a site visit in May 2000 [Environmental Assessment (EA) enclosure 16] to document migratory bird use and their connection to interstate commerce. The recent U.S. Supreme Court ruling (SWANNC v. Corps) negated use of the Migratory Bird Rule to establish. an interstate commerce connection on isolated intrastate waters. The SWANNC decision is not relevant to this proposal because the subject wetlands are not isolated.

Finally, although not raised in the RFA, during the appeal conference the appellant questioned a statement made by the District in the decision document. The District suggests that Section 10 jurisdiction from Lake St. Clair may extend upstream on its tributaries (Auvase Creek and the Sutherland-Oemig Drain) to 23 Mile Road as it does on the Salt River, an established federally navigable waterway (EA page 6). The administrative record does not support this statement. The Ordinary. High Water elevation for Lake St. Clair is 576.3 feet International Great Lakes Datum (IGLD),1985, and the bottom elevation of the onsite ditch at the northeastern end is 583.7 feet IGLD, 85 (converted from 584.4 feet USGS Datum). This statement may be supported by bottom elevations for the nearby Sutherland-Oemig Drain but they are absent from the administrative record. However, the District's statement is irrelevant to the jurisdictional determination made by the District and to the discussion above.

Reason 2: The issues presented in the Carabell's RFA were already decided by the MDNR in favor of the Carabells, so the Corps and the USEPA are barred by res judicata from deciding against the Carabells.

Finding: Reason 2 of this appeal has no merit.

Action: No action required.

Discussion: The appellant believes that the State of Michigan, while administering the Section 404 program, was acting on behalf of the federal government. The USEPA, pursuant to Section 404(g) and 40 CFR 233, formally transferred administration of the Section 404 permit program to the State of Michigan through a Memorandum of Agreement (MOA) signed in 1983. However, under Section 4040(j), the State must still coordinate with the USEPA on certain classes and categories of activities. Because the appellant's proposed discharge of fill material exceeded 10,000 cubic yards, the subject application was not waived from the requirements of Section 404(j). The USEPA responded to the State's public notice with a letter of objection dated 4 March 1994. Regulations at 40 CFR 233.500) clearly state that if the State neither satisfies EPA's objections nor denies the permit, processing of the Section 404 permit application reverts to the Secretary of the Army, acting through the Chief of Engineers.

Following issuance of a State permit, pursuant to an administrative court order, the USEPA sent a. letter dated 23 November 1998 that sustained their. objections to the project. This effectively transferred Section 404 permitting authority to the Corps pursuant

to. the aforementioned regulations.

Res judicata is not an applicable legal principal here. There has been no preceding decision or judgment regarding this permit application in a federal forum. The State of . Michigan followed its own program procedures by conducting an. administrative hearing. The USEPA objected to the result. When the USEPA objects to the State's issuance of a permit, and the State does not revise the permit (or deny it) in accordance with the stated objections, both Section 404(j) of the CWA and 40 CFR 233.500) require the Administrator of the EPA to turn over the permit application to the Secretary of the Army so that the Secretary can process the permit application. The MOA between the State and the USEPA merely implements the statute and regulation.

Reason 3: The Carabells have demonstrated that a permit can be issued under the applicable laws and regulations.

Finding: Reason. 3 of this appeal has no merit:

Action: No action required.

Discussion: In the RFA, the appellant states that the primary factors in the District's denial decision are valuable seasonal habitat and water storage functions from the public interest review. While the District's 5 October 2000 letter does mention these factors, the letter also states that the denial is based on non-compliance with the USEPA's 404(b)(1) Guidelines: The presence of potential habitat and use of the site by the Indiana bat (Myotis sodalis) and possible consultation

with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act is also unresolved. Therefore, the appellant has not shown compliance with all applicable laws and regulations.

The District conducted a fair and adequate public interest review. They published a PN, considered all comments received and documented their evaluation of the applicable public interest review factors. Besides the effects on wildlife habitat and water quality, the District also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology. The District did err when they stated that the proposed storm water detention basin would outlet into the proposed mitigation areas. The proposed project drawings show that the detention basin would outlet to the county ditch. This error is present under several EA headings including Operational Impacts on Water Quality, Shoreline Erosion and Accretion, Flood Hazards and Floodplain Values, and Effects on wetlands, and is implied in Effects on Aquatic Biota. However, although this misconception was a factor in the District's evaluation of the aforementioned public interest factors, this error is harmless because it, alone, is not the sole or overwhelming basis of the District's denial decision.

The District acted appropriately in finding that the appellant has not demonstrated that the proposal is the least environmentally damaging practicable alternative. A housing project is a non-water dependent activity and does not require siting in a wetland. During the State administrative hearing, Mr. Patrick Meagher, the planning consultant for Chesterfield township, stated

that, besides the project site, another undeveloped property is zoned RM-3 (multifamily development) within Chesterfield township (Transcript page 166). At the appeal conference, the appellant stated that this parcel was not considered in their alternatives analysis because it would mean "abandoning" the project parcel. The appellant only examined on-site alternatives and those did not- result in a measurable decrease in wetland impacts. Additional properties may also be available if re-zoned for RM-3 development. A permit cannot be issued when a less environmentally damaging practicable alternative exists or when insufficient information is provided to determine compliance. (40 CFR 230.12(a)(3)].

Although the appellant has not demonstrated avoidance and minimization of aquatic impacts, the District also determined that the proposed mitigation was inadequate. They found that the conversion of 3.7 acres of onsite forested wetland to emergent and open water cover types would not replace the wetland function's lost due to the proposed fill activities. The District did not consider alternative mitigation proposals that may be acceptable because earlier steps in the Guidelines sequence (avoidance and minimization) had not been adequately addressed. The appellant bears the burden of proof to demonstrate compliance with the Guidelines.

Conclusion: For the reasons stated above, I conclude that the three reasons presented in this Request For Appeal do not have merit.

ROBERT H. GRIFFIN
Brigadier General, U.S. Army Commanding

Supreme Court, U.S.
FILED
DEC 2 - 2005
OFFICE OF THE CLERK

No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Attorneys for Petitioners

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 • USSCINFO.COM

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QUESTIONS PRESENTED

I. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

II. Do the limits on Congress' authority to regulate activities that substantially affect interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

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The opinion of the Court of Appeals is reported at 391 F.3d 704 (6th Cir. 2004), Pet. App. 1a-13a. The order of the district court, Pet. App. 15a-17a, which adopts and incorporates the report and recommendation of the magistrate judge, Pet. App. 20a-57a, was reported at 257 F. Supp. 2d 917 (E.D. Mich. 2003).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 27, 2004. That court denied the petition for rehearing *en banc* on January 10, 2005. Petitioners timely filed their petition for a writ of certiorari on April 11, 2005, and this Court granted the petition in an order of October 11, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The United States Constitution provides that Congress has the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides, in relevant part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (7) The term "navigable waters" means the waters of the Untied States, including territorial seas.

33 U.S.C. § 1362(7) (CWA § 502(7)).

Federal regulations define "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters, including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).

STATEMENT

A. Petitioners' Property.

The property at issue in this case is a 19.6-acre parcel in Chesterfield Township, Macomb County, Michigan, lying approximately a mile northwest of Lake St. Clair and less than a mile southeast of the intersection of Interstate 94 and 23 Mile Road. Pet. App. 2a. It is surrounded by residential subdivisions and apartment and condominium complexes, and numerous strip malls and other commercial development can be found to the north of the property, along 23 Mile Road. *See id.* Immediately southeast of the property is "Sebille Manor," a housing facility for military personnel. *See* 6th Cir. Joint Appendix 489. Sebille Manor is associated with the Selfridge Air

National Guard airfield, which is approximately two miles to the south of the property. *See* http://www.selfridge.army.mil/Housing.htm. Approximately fifteen acres of the property are forested wetland. Pet. App. 2a.

The property is shaped roughly like an inverted right triangle, with one leg running from north to south, along Donner Road, and the other leg running at a right angle, from east to west. Pet. App. 21a. The hypotenuse of the triangle runs from the northeast to the southwest, and there is a ditch that borders the property along the hypotenuse, running for approximately 1,800 feet and eventually connecting at its northeast end to the Sutheland-Oemig drain. *Id.* This drain is part of Macomb County's sanitary drain system, and it runs through Sebille Manor and eventually connects to Auvase Creek, which empties into Lake St. Clair. Pet. App. 2a; http://www.macombcountymi.gov/gis/images/county-maintained-drains-map.pdf. A berm runs along the west side of the ditch, forming a barrier between the wetland and the ditch. Pet. App. 3a. The berm was apparently formed more than fifty years ago by the sidecasting of spoils during the excavation of the ditch, and the ditch was apparently created in connection with the construction of the housing at Sebille Manor. *See* Pet. App. 62a.

The property retains water at various times during the year because the berm prevents surface water from draining off the property and into the ditch and because the soils on the property are comprised of dense clay, which drains poorly. There is no dispute in the record that the property lacks a surface or ground water connection to the ditch or to any other body of

navigable or non-navigable water. J.A. 36a-37a, 40a, 82a-83a, 99a-100a.

Respondents have previously argued that "the wetland on Petitioners' tract has at least an occasional hydrologic connection to . . . Lake St. Clair, a traditional navigable water" because Respondent United States Army Corps of Engineers (the Corps) found – and the lower courts agreed – that a berm prevents the "immediate drainage" of the wetland to an adjacent tributary of Lake St. Clair. *See* Brief in Opposition 9. This statement does not accurately describe the evidence in the administrative record or the findings by either the Corps or the lower courts.

In fact, the Corps actually made contrary findings. In its own fact-finding process here, the Corps determined that "the parcel is not currently part of the S[utherland]-O[emig] Drain watershed." J.A. 99a-100a. Moreover, the Corps specifically acknowledged that the wetland is isolated from any other water by asserting that "berms and other features . . . presently isolate the wetland from the S-O Drain and receiving waters." J.A. 106a. Similarly, during an administrative hearing, an official of the Corps asserted that, with respect to the wetland, "right now there is no outflow. Essentially it is off-line, if you will." J.A. 185a-187a. Thus, the Corps found that the wetland was not part of the watershed for the Sutherland-Oemig drain, and, therefore, that there is no ground or surface water connection between Petitioners' wetland and any tributary of a navigable water.[1]

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[1] Respondents have previously attempted to obscure the Corps' finding in two ways. First, they have hypothecated that it might be possible for water to accumulate in the wetland so that it

B. Proceedings Before the State Administrative Agency.

In 1993, Petitioners applied to the Michigan Department of Environmental Quality (MDEQ) for a permit to fill the forested area of the property for the purpose of building 130 condominium units, along with the associated roads and utilities. J. A. 27a-29a. The MDEQ initially denied the application, but Petitioners subsequently filed an alternative plan, seeking to fill only 12.2 acres and build 112 condominium units. J.A. 29a. The alternative plan also proposed to construct enhanced and functional wetlands on 3.74 acres of the property, which would filter any water draining across the property. *Id.* The MDEQ conducted a contested-

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overtopped the berm. Respondents' Court of Appeals Brief at 8. The problem with this speculation is that it is not based upon any evidence in the record or upon any finding made by the Corps or the district court; it is a purely theoretical assertion. Second, Respondents have contended that, during the administrative appeal hearings, Petitioners' counsel conceded that water from the wetland could enter the Sutherland-Oemig Drain by overtopping the berm or flowing through drainage cuts in the berm. Brief in Opposition at 9-10. This characterization of statements by Petitioners' counsel is inaccurate. In the portion of the administrative appeal hearing cited by Respondents, the parties discussed Petitioners' development plan for their property, specifically, their proposal of a water retention pond as a part of that plan. Reciting the various advantages of the plan, Petitioners' counsel noted that the proposed water retention pond would actually have a greater capacity for holding water run-off from neighboring properties than the existing wetland. J.A. 184a-188a. Petitioners' counsel never asserted that water had ever overtopped the berm or otherwise flowed from the wetland into the Sutherland-Oemig Drain; he asserted that the theoretical water-holding capacity of the proposed retention pond was greater than the theoretical water-holding capacity of the existing wetland. *Id.*

case hearing on the alternative plan, which included several days of testimony. J.A. 24a. During this hearing, Petitioners and the MDEQ submitted extensive testimonial and documentary evidence, and the MDEQ issued a proposed decision in August 1998, recommending the issuance of the permit. J.A. 23a-43a. Crucial to this recommendation was the fact that the wetland was isolated from any body of water:

> This opinion is premised on the fact the wetland does not have a surface water connection to adjacent properties or any body of water, and the property to the immediate north is isolated by a retention pond. Furthermore, the drainage ditch along Donner Road prevents a discharge of water both to and from the site, and the Sutherland-Oemig drain is bermed, which prevents the discharge of water either into it or from the drain.

J.A. 36a. A Final Determination and Order embodying the proposed decision was issued on September 30, 1998. J.A. 50a-59a.

C. Proceedings Before the Corps.

In November 1998, acting pursuant to 33 U.S.C. § 1344, the EPA notified the MDEQ that it objected to the issuance of the permit to Petitioners, and it asserted federal jurisdiction over the case on the ground that the property was a wetland that was adjacent to the navigable waters of the United States. Also pursuant to § 1344, the EPA authorized the Corps to determine whether a federal permit should issue to allow the proposed development. Although Petitioners

contested federal jurisdiction, they nevertheless submitted a permit application to the Corps.

The Corps initially conducted a "Permit Evaluation," which was based upon three site inspections. One of the site inspections was documented in a report dated May 5, 2000. J.A. 81a-83a. This report specifically focused on the question of federal jurisdiction over the wetland on the property. The report did not identify any hydrological connection with any waterway, merely noting that the site is adjacent to the Sutherland-Oemig drain. J.A. 82a-83a. In addition, the report "determined that the site does support intestate commerce." J.A. 82a. The report also concluded that the waterway was not navigable and was not a tributary to navigable water. *Id.* In the permit evaluation, which followed this report, the Corps did not specifically address the question whether the wetland had any surface or groundwater connection with the Sutherland-Oemig drain, or with any other body of water, focusing instead on the wetland's function as a habitat for migratory birds. J.A. 93a-94a, 103a-105a. Indeed the Corps speculated about whether there was a physical connection between the wetland and Lake St. Clair:

> [d]ue to the fact that the influence of Lake St. Clair has been documented on the nearby Salt River over a mile up the reaches of the river (to 23 Mile Road), it is likely that the same influence is realized on the Auvase Creek, and continuing up the Sutherland-Oemig Drain that distance in the landscape, as well.

J.A. 92a.[2]

On the basis of this permit evaluation, the Corps denied Petitioners' application on October 5, 2000. J.A. 127a-129a. In a memorandum, which was attached to the Corps' decision letter, the Corps' District Engineer, Lt. Col. Richard J. Polo, Jr., relied upon the permit evaluation's finding that the property was a valuable seasonal habitat for aquatic organisms and a year-round habitat for terrestrial organisms, such as migratory birds, and that it was one of the last forested "stopover points" for migratory birds near the open water of Lake St. Clair. J.A. 131a-132a. Consequently, the Corps' decision gave significant weight to the importance of the wetlands as a habitat for migratory birds. J.A. 103a-105a.

On December 1, 2000, Petitioners submitted a request for an administrative appeal. In the appeal, the Corps asserted that its jurisdiction was derived from § 1344 and 33 C.F.R. § 328.3(a) solely because the property was a wetland that was adjacent to the waters of the United States. J.A. 212a-215a. The Corps disclaimed jurisdiction under any other statute or regulation, and specifically abandoned its prior reliance the Migratory Bird Rule. *Id.* The Corps denied Petitioners' appeal on March 5, 2001. J.A. 210a-219a. Ironically, in denying Petitioners' Appeal, the Corps never reached any conclusions about whether there was any hydrological connection between the wetland and the watershed, relying entirely upon the fact that the wetland was physically proximate to a drainage ditch. J.A. 212a-215a.

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[2] In the administrative appeal, this speculation was specifically rejected by the Corps. J.A. 216a.

D. Proceedings in the Lower Courts.

Petitioners challenged the Corps' decision in the district court. Ruling on the parties' cross-motions for summary judgment, the district court adopted the report and recommendation of a magistrate judge and ruled that the Corps was correct in asserting jurisdiction over the wetland under 33 C.F.R. § 328.3(a)(7), which extends Clean Water Act authority to "wetlands adjacent" to navigable waters and their tributaries. Pet. App. 20a-57a. The district court acknowledged that, in *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court had ruled that the Act regulated only those waters that had a "significant nexus" with the "waters of the United States," and it concluded that the wetland on the property had such a "significant nexus" and that Petitioners' property "is in fact not isolated, and is subject to the jurisdiction of the [Clean Water Act]." Pet. App. 49a. But the district court did not identify what constituted the "significant nexus" in this case, nor did it address the significance, if any, of the undisputed fact that the wetland lacked any hydrological connection with any of the navigable waters of the United States. The district court simply concluded that the physical proximity of the wetland to the drainage ditch and/or to the Sutherland-Oemig drain was sufficient to satisfy the regulatory requirement of adjacency and that, therefore, the Corps properly asserted jurisdiction over the wetland. *Id.*

On appeal to the Sixth Circuit, Petitioners reiterated their argument that their property was not subject to federal jurisdiction under the Clean Water Act because it did not have a significant nexus with a

navigable water. The Sixth Circuit rejected this argument by concluding that the physical adjacency of the wetland to a tributary of a federal water was sufficient, in itself, to create federal jurisdiction. Pet. App. 12a.

The Sixth Circuit began its analysis by noting that the Corps' interpretation of its own regulations was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 6a-7a. Applying 33 C.F.R. § 328.3(a)(7), the Sixth Circuit reasoned that the existence of the berm separating the property from the drainage ditch did not prevent federal jurisdiction because, under that regulation, the definition of "adjacent wetlands" includes a wetland that is separated by a berm or man-made barriers from a tributary of federal waters. Pet. App. 9a. The Sixth Circuit then noted that this reading of § 328.3(a)(7) was not affected by this Court's decision in *SWANCC*. Pet. App. 10a. According to the Sixth Circuit, most federal circuit courts, with the exception of the Fifth Circuit, have held that *SWANCC* should be narrowly applied, only precluding federal jurisdiction over isolated waters under the Migratory Bird Rule. *Id.* Thus, the Sixth Circuit concluded that this Court's decision in *SWANCC* did not alter the broad definition of "adjacent wetlands," which, in the Sixth Circuit's view, was set forth in this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). Pet. App. 10a-12a. Under that definition, the Sixth Circuit held that the district court did not err in finding that Petitioners' property did not contain isolated wetlands and that it had a "significant nexus" with federal waters. Pet. App. 12a. In reaching this holding, the Sixth Circuit, like the district court, did

not, however, precisely explain what characteristic of the wetland provided this "significant nexus." *See id.*

SUMMARY OF ARGUMENT

I. In *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court held that the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), was enacted under Congress' authority to regulate the navigable waters of the United States. Applying well-established principles regarding the scope of that authority, the *SWANCC* Court held that federal jurisdiction under § 404(a) of the Act extends only to waters or wetlands that have a "significant nexus" with the navigable waters of the United States. *SWANCC*, 531 U.S. at 167. The plain language of the CWA and the overwhelming weight of federal case law, including numerous decisions of this Court, establish that no "significant nexus" can ever exist in the absence of a physical connection, such as a surface or ground water connection, with the navigable waters of the United States. While federal authority under the CWA may extend to some non-navigable tributaries of the navigable waters, it cannot, in any event, extend to a wetland that is hydrologically isolated from the navigable waters.

In this case, the Sixth Circuit has held, and Respondents argue, that a "significant nexus" can exist even in the absence of a hydrological connection, relying upon a regulation promulgated by the Corps, 33 C.F.R. § 328.3(a)(7), which extends federal authority to "wetlands adjacent" to navigable waters and their tributaries. Contrary to the Sixth Circuit's ruling, and to Respondents' position, the regulatory concept of

"adjacent wetlands" cannot be applied to wetlands that are merely proximate to a non-navigable tributary of a navigable water and that lack a surface or ground water connection to navigable waters. For the purposes of the statute and the attendant regulations, a hydrological connection is a necessary condition for finding that a wetland is "adjacent" to a navigable water, and the Corps lacks the authority to apply the Act to regulate any wetland without such a connection. Because the terms of the Act are clear in limiting the scope of federal authority to regulate waters and wetlands, the Corps is not entitled to any deference in its interpretation of the Act and its application of the Act through its regulations and the enforcement of those regulations.

II. If the Clean Water Act is interpreted to permit the exercise of federal jurisdiction over hydrologically isolated, intrastate wetlands, it exceeds the authority created by the Commerce Clause. For the reasons asserted in the previous argument, the authority to regulate such isolated wetlands cannot arise from the federal power over navigation, which is founded in the Commerce Clause. Similarly, the Commerce Clause's more general power to regulate economic activities that substantially affect interstate commerce cannot be the source of authority to control the filling and dredging of isolated wetlands. Such conduct does not, in itself, substantially affect interstate commerce. Moreover, there is no intelligible jurisdiction principle in the Act or its attendant regulations. Consequently, if this Court concludes that the Corps has lawfully interpreted and applied the Act in this case, it should hold that the Act exceeds Congress' general commerce power.

ARGUMENT

I. UNDER THE PRINCIPLES LIMITING FEDERAL AUTHORITY OVER NAVIGATION, WHICH WERE REAFFIRMED IN *SWANCC*, FEDERAL AUTHORITY UNDER THE CLEAN WATER ACT CANNOT EXTEND TO WATERS OR WETLANDS THAT LACK A HYDROLOGICAL CONNECTION TO THE NAVIGABLE WATERS OF THE UNITED STATES.

The Sixth Circuit's ruling here is erroneous and should be reversed because it impoverishes the meaning of the statutory terms "navigable waters" and "waters of the United States," and it gives the Corps extraordinary power to regulate matters that have traditionally been exclusively reserved for regulation by the States. If the Corps may regulate any wetland that is near – but not physically connected to – a non-navigable tributary of navigable waters, the Corps will extend federal authority over an enormous expanse of land, all of which lacks a meaningful connection to the Nation's navigable waters. Because such a grant of authority has no relationship to the Clean Water Act's fundamental purpose of protecting the Nation's navigable waters, it is inconsistent with the authority created by the Act. In addition, through this authority, the Corps will effectively exercise a wide-ranging federal police power over all kinds of land use. A saturated portion of a residential lawn, which is near a storm drain, or an area of standing water in a farm field, which is near a drainage ditch, will come within the scope of § 404(a) of the Act, and the owners of such land will have to obtain permits from the Corps before

making a variety of ordinary land-use decisions. Such an extension of federal authority usurps authority that has traditionally been conferred upon the States and is entirely inconsistent with both the language of the Act and this Court's decision in *SWANCC*.

A. The Scope of Federal Authority to Regulate the Navigable Waters of the United States.

In this case, the Corps' decision to prevent Petitioners from developing their property depended upon Section 404(a) of the CWA, 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), which regulates the discharge of dredged or fill material into "the navigable waters." Under § 502(7), the CWA defines "navigable waters" as "waters of the Untied States, including territorial seas." 33 U.S.C. § 1362(7). Consequently, the dispositive question in this case is whether a hydrologically isolated wetland can be classified as one of the "navigable waters" or as one of the "waters of the United States" for the purposes of the CWA. The interpretation of these crucial statutory terms must begin with a consideration of their plain meaning. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). If the meaning of a statutory term is clear, "'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

At the time of the CWA's enactment, the term "navigable waters" had a specific, well-established meaning in federal law, denoting those rivers, lakes, streams, and other bodies of water that were used for navigation in interstate commerce or that could be so

used in the future, after reasonably anticipated improvements. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). This meaning must control the interpretation of "navigable waters" in the context of the CWA because "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). This Court has already held that the CWA does not include any statement demonstrating that Congress intended to depart from or expand upon the traditional meaning of "navigable waters" for the purposes of the CWA. *See SWANCC*, 531 U.S. at 169-72. At the time of CWA's enactment, even the Corps concluded that "navigable waters" referred to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (quoted in *SWANCC*, 531 U.S. at 168). Even though the Corps subsequently adopted a more expansive definition of "navigable waters," this Court concluded that Congress neither adopted nor acquiesced in that definition when it amended the CWA and that the traditional meaning of "navigable waters" still controlled the interpretation and application of the statute. *SWANCC*, 531 U.S. at 172.

When Congress regulates the "navigable waters," it exercises its authority to regulate interstate commerce under Article I, Section 8, Clause 3 of the Constitution. This authority involves the power of the United States "to secure the uninterrupted navigability

of all navigable streams within the limits of the United States." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). More specifically, "the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country." *Id.* In regulating this "continued highway," *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-64 (1870), the federal government's primary object is to prevent "any interference with the country's water assets" and to assure that the navigable waters always have a sufficient flow of water to permit their use in commerce. *Appalachian Elec. Power Co.*, 311 U.S. at 405-07. Thus, federal navigation power may extend to non-navigable waters that are physically connected to the navigable waters and that are capable of being actually navigable in the future through improvements anticipated in the ordinary course of events. *The Daniel Ball*, 77 U.S. at 563; *Appalachian Elec. Power Co.*, 311 U.S. at 406. In addition, the federal government may regulate the non-navigable tributaries of the navigable waters, to the extent necessary to protect the capacity and integrity of the channels of navigation. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941); *see also United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960).

Although the federal government's power to regulate navigable waters comes from the same source as the general power to regulate economic activities that substantially affect interstate commerce, the power over navigable waters has a more limited scope, and this authority must be balanced against the States' police power over land and water use. *SWANCC*, 531

U.S. at 172-73. The general power to regulate water use is an essential aspect of sovereignty, which is reserved for the States. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977); *United States v. Texas*, 339 U.S. 707, 717 (1950). The States therefore retain "total authority over [their] internal waters," except where the federal government has reserved specifically enumerated powers, such as the power to regulate navigation. *California v. United States*, 438 U.S. 645, 662 (1978) (citing *Rio Grande Dam & Irrigation*, 174 U.S. at 709). For all purely intrastate waters, federal authority is limited to protecting navigability or to protecting other specific federal interests that are related to the flow of water through the channels of interstate commerce and their tributaries. *See, e.g., Appalachian Elec. Power Co.*, 311 U.S. at 423-26 (discussing federal authority to regulate hydroelectric power plants in light of their nexus with the flow of water in the navigable waters); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (discussing federal authority to regulate water use in connection with the reclamation of water resources in arid western states, in light of the nexus between reclamation projects and the preservation of the flow of water in interstate waters); *see, generally*, Roderick E. Walston, *The Federal Commerce & Navigation Powers:* Solid Waste Agency of Northern Cook County's *Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, (2002). The federal government's "domination over the water power inherent in the flowing stream" of the navigable waters entails that the federal navigation power may extend to some non-navigable tributaries of the navigable waters because such tributaries may play an important role in determining the capacity and volume of the navigable

waters. *Appalachian Elec. Power*, 311 U.S. at 424. Nevertheless, this extension of federal authority must be carefully drawn to avoid unnecessary incursions upon the States' primary power to regulate land and water use. *See California*, 438 U.S. at 645. In general, the federal government may regulate the intrastate non-navigable tributaries of navigable waters but only insofar as it is necessary to protect the integrity of the aquatic system that constitutes the navigable waters. *See Appalachian Elec. Power*, 311 U.S. at 423-26.

Given these limitations, the waters of the United States that are subject to federal authority cannot ever include any body of water that lacks a physical connection to the navigable waters. An intrastate body of water that lacks such a physical connection, via surface or ground water, cannot have any effect on the flow of water in the navigable waters and, therefore, cannot be subject to federal authority. If the federal government were to exercise authority over a hydrologically isolated, intrastate water, such an exercise would not serve any of the specifically enumerated federal powers which implicate the navigable waters, and it would intrude on an essential aspect of state sovereignty – the power to regulate water use.

Indeed, this Court has specifically recognized that the federal authority over "navigable waters" cannot extend to any intrastate body of water that lacks a hydrological connection with the "navigable waters." In *The Montello*, 78 U.S. (11 Wall.) 411 (1870), this Court considered whether the Fox River in Wisconsin could be classified as a navigable water and could, therefore, be subject to the federal navigation power. In answering this question, this Court determined that the federal authority over the

navigable waters cannot extend beyond the system of interconnected waters that form "a continued highway over which commerce is or may be carried on with other States or foreign countries." *The Montello*, 78 U.S. at 415. In particular, this Court noted that an intrastate water:

> can only be deemed a navigable water of the United States when it forms, by itself, or *by its connection with other waters*, such a highway. . . . If, however, the river is not itself a highway for commerce with other States or foreign countries, or does not form such a highway *by its connection with other waters* . . . then it is not a navigable water of the United States . . . .

Id. (citation omitted) (emphasis added).

The same principle about the necessity of a hydrological connection that would prevent a purely intrastate river, lake, or stream from being classified as one of the navigable waters should also apply to a wetland. Indeed, this Court has recognized the application of this principle to wetlands when it held that the CWA applied to wetlands only to the extent that they are "inseparably bound up" with the waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Thus, this Court has established that the federal authority over the navigable waters can never extend beyond the boundaries of the continuous, physically integrated aquatic system from which the navigable waters of the United States are derived.

A common-sense reading of the terms "navigable waters" and "waters of the United States" reinforces the proposition that those terms cannot refer to waters

without a physical connection to the channels of interstate commerce. As noted above, when interpreting legal terms of art, this Court looks primarily to the established definition of those terms. *Davis*, 489 U.S. at 813. Nevertheless, the ordinary meaning of those terms is also relevant to their interpretation. *Hubbard v. United States*, 514 U.S. 695, 700 (1995) (determining the meaning of statutory terms by undertaking a "commonsense reading" of those terms alongside an understanding of the specific statutory definitions of those terms). The ordinary meaning of "water" includes not only bodies of water, such as bays, lakes and rivers; it also includes the substance itself. WEBSTER'S NEW COLLEGIATE DICTIONARY (1980) (defining "water," among other things, as "the liquid that . . . forms streams, lakes, and seas" and as "the water occupying or flowing in a particular bed"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed. 1971) (defining "water," among other things, as "the liquid content of a river, inlet, etc. . . ."). Accordingly, the terms "navigable water" and "waters of the United States" denote both the channels of interstate commerce as well as the water flowing through those channels. Because the water in those channels may flow from non-navigable tributaries, the water in those tributaries may, in some circumstances, be included in the definition of "navigable waters" and "waters of the United States." By the same token, a hydrologically isolated, intrastate body of water or wetland cannot be classified as a "navigable water" or "water of the United States" in any respect because the substance flowing in one of those isolated bodies never mingles with the navigable waters of the United States. Given the principle that it is improper to define a statutory

term so broadly that crucial elements of that term lose all of their significance, it is improper to define "navigable water" or "waters of the United States" to include hydrologically isolated bodies of water or wetlands. *SWANCC*, 531 U.S. at 172 ("it is one thing to give a word limited effect and quite another to give it no effect whatsoever").

When the CWA was originally enacted, and when it was amended, Congress certainly knew how to define the statutory terms broadly so that the Act could apply to any water or wetland, even if that water had a tangential, attenuated, or intermittent influence on the channels of interstate commerce – or no influence at all. Because Congress did not use such broad definitions, and because it chose to use terms with a specific and limited meaning, it is impossible to expand the interpretation of those terms beyond their inherent limitations. *See SWANCC*, 531 U.S. at 168 (noting that the Corps initially interpreted the CWA's scope to include only waters that were actually navigable or could be reasonable so made). While the "navigable waters" may include some of their non-navigable tributaries, and while they may include some wetlands that are "inseparably bound up" with them, *Riverside Bayview*, 474 U.S. at 134, they may not, in any event, include a wetland that lacks a hydrological connection with them.

B. The Scope of Federal Authority to Regulate Wetlands under the Clean Water Act as Navigable Waters of the United States.

In two cases within the last twenty years, *Riverside Bayview* and *SWANCC*, this Court has

recognized the principle that the authority created by the CWA extends only to those waters that are "inseparably bound up" with the navigable waters of the United States. These cases have both emphasized that the CWA purports to protect the chemical, physical, and biological integrity of the navigable waters of the United States and that, therefore, the CWA can only regulate those waters and wetlands that have a sufficient, tangible connection with the navigable waters. In *SWANCC*, this Court made a necessary deduction from this principle – that the CWA cannot apply to intrastate ponds or other bodies of water that are hydrologically isolated from the navigable waters. This deduction should govern the crucial issue in this case: whether the CWA applies to hydrologically isolated wetlands.

In *Riverside Bayview*, this Court considered the scope of CWA jurisdiction over wetlands. The general question in that case was whether eighty acres of low-lying, marshy land near Lake St. Clair were covered by the Corps' regulation that defined "waters of the United States" to include wetlands adjacent to the navigable waters. *Riverside Bayview*, 474 U.S. at 123-24. To answer this question, the *Riverside Bayview* Court considered two problems in defining the scope of the CWA. First, it considered whether the Corps had the authority under the CWA to promulgate a regulation defining "waters of the United States" as wetlands that were adjacent to navigable waters. Second, it considered whether a wetland could be classified as "adjacent" for the purposes of the statute when it was inundated or saturated by water from any source or only when it was inundated or saturated by water from the nearby navigable water. The *Riverside Bayview* Court's analysis of these problems confirmed

that the CWA applies no farther than the outer limit of the continuous hydrologic system that constitutes the navigable waters.

In discussing the first problem, the *Riverside Bayview* Court noted that defining the outer limits of the Corps' authority under the CWA must begin with an understanding of the statute's general purpose: "'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Riverside Bayview*, 474 U.S. at 132 (quoting CWA § 101, 33 U.S.C. § 1251). The *Riverside Bayview* Court noted that, to accomplish this purpose, the CWA would have to apply to more than just the navigable waters themselves; it would have to protect at least some of the tributaries that feed the navigable waters because "'water moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source.'" *Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742). Thus, this Court concluded that the CWA could apply to non-navigable waters and to wetlands adjacent to navigable waters because all of these were, at least in theory, part of the hydrologic systems that determined the chemical, physical and biological integrity of the navigable waters. *Riverside Bayview*, 474 U.S. at 134.

This conclusion about the centrality of protecting hydrologic systems informed this Court's resolution of the second problem: whether the CWA extended only to wetlands that were inundated or saturated by water originating in the near-by navigable water. Because "wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands," this Court concluded that adjacent wetlands were

covered by the CWA, regardless of the source of the water that made them wetlands. *Riverside Bayview*, 474 U.S. at 134. In particular, this Court noted that wetlands could serve important filtering and flood control functions when waters from those wetlands drained into a body of navigable water. *Id.* Accordingly, this Court held that the Corps could define the "waters of the United States" to include wetlands that were adjacent on the basis of the idea that such wetlands were "inseparably bound up" with the navigable waters. *Riverside Bayview*, 474 U.S. at 134-35. Of course, the premise of this conclusion is that CWA jurisdiction over wetlands arises from the tangible connection between such wetlands and the navigable waters.

Given the fact that the wetlands at issue in *Riverside Bayview* were adjacent to an open body of water – Lake St. Clair – and given that those wetlands had a surface water connection with Lake St. Clair,[3] this Court concluded that the case did not implicate the outer limits of federal authority under the CWA, and it did not draw any conclusions about precisely where those limits would be drawn. In particular, it concluded that "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill

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[3] In *Riverside Bayview*, this Court did not address the factual question whether there was a surface water connection between Lake St. Clair and the wetland; but this Court accepted the district court's factual findings about the circumstances of the wetland, *Riverside Bayview*, 474 U.S. at 130-31, and the district court found that there was, at the very least, an occasional surface water connection between the wetland and Lake St. Clair. *See United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 394-97 (6th Cir. 1984) (discussing the district court's findings), *rev'd*, 474 U.S. 121 (1985).

material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview*, 474 U.S. at 131 n. 8; *see also SWANCC*, 531 U.S. at 187 n. 13 (Stevens, J., dissenting) (discussing *Riverside Bayview* and its reservation of the question whether federal jurisdiction under the CWA extended to "isolated wetlands"). The *Riverside Bayview* Court also noted the difficulty of defining the outer limits of the Corps' authority under the CWA:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily chose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview, 474 U.S. at 132. Despite this uncertainty about precisely where CWA jurisdiction ended, *Riverside Bayview* nevertheless confirmed the principle that the federal authority over the navigable waters involves the protection of waters and wetlands that are part of a "continuum" of waters that begins with the channels of interstate commerce – that is, an integrated, continuous hydrologic system from which the navigable waters are derived.

In *SWANCC*, this Court refined the principles governing CWA jurisdiction and moved closer to a

definition for the limit of the term "waters of the United States." The *SWANCC* Court applied the principle that federal authority under the CWA could extend to waters that had a physical connection to the navigable waters of the United States. In making this application, this Court rejected the proposition that CWA jurisdiction could be established by a purely ecological connection between a hydrologically isolated intrastate pond and navigable waters. This ruling was entirely consistent with the principle that a physical or hydrological connection is the bare minimum for CWA jurisdiction.

In *SWANCC*, this Court considered the legality of one of the regulations promulgated by the Corps under the Act, the so-called "Migratory Bird Rule." The Migratory Bird Rule defined "waters of the United States" to include any water that served or that might serve as a habitat for migratory birds or endangered species. *SWANCC*, 531 U.S. at 164 (discussing 51 Fed. Reg. 41217). The Corps defended this regulation as being properly within the scope of the Act's authority because the protection of such habitats was necessary for the preservation of the ecological integrity of aquatic ecosystems. *See id.* The Corps also contended that Congress had acquiesced to the Corps' conclusion that "waters of the United States" could extend beyond the established limits for the federal power over navigation to include isolated, non-navigable, intrastate waters that had an ecological connection to navigable waters, such as providing a habitat for species that also inhabited the navigable waters. *SWANCC*, 531 U.S. at 168-69. In this respect, the Corps contended that this Court's decision in *Riverside Bayview* should be read to allow the regulation of any body of water, as long as such a regulation was undertaken for the same

ecological purposes that would animate the regulation of the navigable waters. *See Riverside Bayview*, 474 U.S. at 134-35.

This Court rejected the Corps' position that federal authority under the Act could extend to protect ecological connections between intrastate waters and waters of the United States. *SWANCC*, 531 U.S. at 171-72. The foundation of this Court's reasoning was that the fundamental purpose of the Act was to protect waters and aquatic ecosystems, including wetlands, that had a "significant nexus" with navigable waters. *SWANCC*, 531 U.S. at 167. Consequently, this Court held that wetlands were subject to regulation under the Act to the extent that they were "'inseparably bound up'" with the "waters of the United States." *Id.* (quoting *Riverside Bayview*, 474 U.S. at 134). By employing this concept of an inseparable connection, this Court's opinion in *SWANCC* resonates with the long line of case law establishing that federal authority over navigable waters cannot extend to waters that lack a physical connection with the navigable waters. Thus, this Court repudiated the proposition that federal jurisdiction could be based solely upon an ecological connection between a wetland and a navigable water. This Court's ruling established that the preservation of habitat for migratory birds had no proximate effect on the preservation of navigable waters and therefore could not be a sufficient basis for the exercise of CWA jurisdiction. *SWANCC*, 531 U.S. at 174. Indeed, in his dissenting opinion, Justice Stevens concluded that the opinion in *SWANCC* led directly to this conclusion. *See SWANCC*, 531 U.S. at 176 n. 2 (Stevens, J., dissenting).

Thus, *Riverside* Bayview and *SWANCC* establish the proposition that wetlands have a significant nexus with the navigable waters when they

are "inseparably bound up" with those waters because, at a minimum, they have a hydrological connection via ground or surface water with the navigable waters of the United States. A wetland that lacks such a hydrological connection, such as the one at issue in this case, has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*, which were found to be outside of the scope of the Act's authority.

C. Because the Meaning of the Statutory Terms "Navigable Water" and "Waters of the United States" are Clear, The Corps Has No Discretion to Define Those Terms to Include Waters That Lack a Hydrological Connection to the Waters of the United States.

Despite the clear, unambiguous meaning of the CWA's jurisdictional terms, the Corps insisted in this case – as it did in *SWANCC* – that it was entitled to judicial deference in its construction and application of those terms. In reviewing the Corps' application of § 328.3(a)(7) to the property, the Sixth Circuit agreed, concluding that, under the principles set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was required to defer to the Corps. Pet. App. 6a-7a. Deference to the Corps regarding CWA jurisdiction was misplaced for two reasons: (1) because, as explained above, the Corps' interpretation and application of the Act in this case is flatly contrary to Congress' clearly stated intention that jurisdiction under the Act should not extend any farther than the limit of Congress' navigation power; and (2) because judicial deference is

not warranted when an agency decision implicates the outer limits of federal authority under the Commerce Clause.

When an administrative agency interprets a statute for the purpose of resolving a particular issue, *Chevron* prescribes that a reviewing court engage in a two-part inquiry to determine whether and to what extent the agency's interpretation warrants deference. *Chevron*, 467 U.S. at 842-43. First, the court examines the statutory text to determine whether Congress directly addressed the issue in question. *Id.* If the statute includes a clear statement of congressional intent regarding the issue, the court does not defer to the agency in any way but, instead, gives effect to that clear statement and ends its inquiry. *Id.* If the statute is silent or ambiguous about the issue, the court proceeds to the second part of its inquiry, considering whether the agency's resolution of the issue is based upon a permissible construction of the statute. *Id.*

When the Corps relied upon its regulation at § 328.3(a)(7) to assert jurisdiction over the wetland here, it addressed the issue whether the Act extends federal authority to isolated, intrastate wetlands. But this Court has already held that the Act unambiguously resolved that issue. In *SWANCC*, the Corps argued that Congress did not address the precise question of § 404(a)'s scope with regard to non-navigable, isolated, intrastate waters and that it was entitled to deference in its construction of § 404(a) to resolve that question. *SWANCC*, 531 U.S. at 172. This Court squarely rejected that argument, however, concluding that "[w]e find § 404(a) to be clear" and ruling that an isolated, intrastate pond was not within the scope of the Act. *Id.* As noted above, the clarity of § 404(a) is the product of its use of the well-established concept of "navigable

waters," which cannot be interpreted to include any body of water that is hydrologically isolated from the channels of interstate commerce. Because § 404(a) is so clear on the central issue in this case, there is no need for deference to the Corps' own assessment of the extent of its authority under the Act.

Deference to the Corps' jurisdictional analysis in is unwarranted for another reason that was relevant to this Court's ruling in *SWANCC* and that is, in effect, a special case of *Chevron*'s "clear statement" rule. In *SWANCC*, this Court invoked the principle that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bld'g & Constr. Trades Council*, 485 U.S. 568 (1988)). This principle is derived both from this Court's "prudential desire not to needlessly reach constitutional issues" and from its "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73. This principle applies with special force when the administrative interpretation would alter the traditional balance between federal and state authority. *SWANCC*, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)).

This principle is particularly important in the context of balancing state and federal prerogatives over the control of intrastate waters. This Court has held that the federal government must defer to state authority over such waters, unless there is a clear directive from Congress that would require the overriding of state law. In *California v. United States*, 438 U.S. 645 (1978), this Court considered whether

federal agencies were required to adhere to state laws regarding water use when those agencies acted to fulfill the purposes of § 8 Reclamation Act of 1902, 32 Stat. 390, as codified 43 U.S.C. §§ 372, 383. This Court held that those agencies were bound by state law in the absence of any clear, contrary provision in the relevant federal statute. *California*, 438 U.S. at 674-75. Moreover, this Court also noted that federal deference to state rules was particularly appropriate where the federal statute "makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. Although the *California* Court did not specifically invoke the same reasons identified in *SWANCC* for withholding deference to administrative agencies, it did employ the same fundamental principle, concluding that federal agencies may not intrude upon the States' prerogatives in the regulation of water use unless Congress has clearly and specifically directed such agencies to do so through the text of a statute.

This principle applies to the Clean Water Act for two reasons, in addition to the reasons discussed in *SWANCC*. First, it applies because the CWA, as with the Reclamation Act, unambiguously expresses Congress' intention that the federal government should give precedence to the States' primary power over water use. *See* 33 U.S.C. § 1251(b). Second, it also applies because, as previously discussed, the CWA arises from the federal navigation power, which carries with it an inherent limitation that mandates deference to state authority regarding water regulation. Consequently, the CWA presents a circumstance in which there are especially powerful reasons to depend upon the principle that the federal courts need not defer to an agency's statutory interpretation, when that

interpretation would infringe upon the ability of state governments to control water use within their borders.

D. The Overwhelming Majority of Federal Courts Have Required a Hydrological Connection as a Necessary Condition for Establishing Clean Water Act Jurisdiction.

Since this Court's opinion in *SWANCC*, numerous courts have addressed the question of CWA jurisdiction over wetlands, and the overwhelming majority of those courts have followed the analysis in *SWANCC* and recognized that the authority created by § 404(a) is limited to wetlands that, at a minimum, have a ground or surface water connection to the navigable waters of the United States. These courts have identified a hydrological connection as the "significant nexus" to the navigable waters that is the necessary condition for creating federal jurisdiction under the CWA. Moreover, these rulings are also consistent with the prevailing analysis of CWA jurisdiction in the federal courts before *SWANCC*, both with respect to wetlands and with respect to other non-navigable tributaries of navigable waters. By contrast, the only federal courts that have not required a hydrological connection as the *sine qua non* of CWA jurisdiction, including the Sixth Circuit here, have not followed *SWANCC*'s reasoning about the limits of the federal navigation power, and they have reflexively and uncritically deferred to the Corps' open-ended understanding of the concept of "adjacent wetlands." In so doing, this judicial minority improperly expanded the scope of federal power and intruded upon the

States' traditional and well-established power to control land and water use.

Following *SWANCC* by focusing on the scope of federal navigation power, the Fourth Circuit has repeatedly identified a hydrological connection between a wetland and navigable waters as the minimum requirement for finding CWA jurisdiction under § 404(a). For example, in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the wetland in question had an intermittent surface water connection extending across thirty-two miles to Chesapeake Bay, via man-made roadside ditches as well as natural bodies of water. *Deaton*, 332 F.3d at 702. The property owner contested the Corps' assertion of jurisdiction over the wetland, citing the tenuous character of the hydrological connection, and arguing that any dredging or filling in his wetland would have no tangible effect on the navigable waters. *Deaton*, 332 F.3d at 705. The Fourth Circuit rejected this argument, however, and held that the wetland was within the authority created by the CWA because the federal government's power to regulate the navigable waters of the United States included the power to prevent any injuries to those waters, which might arise from pollution in the hydrological sources of those waters. *Deaton*, 332 F.3d at 707-08. Similarly, in *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), the Fourth Circuit again ruled that a 2.4-mile, intermittent surface water connection between a wetland and a navigable water was sufficient to create the "significant nexus" required by *SWANCC*. *Treacy*, 344 F.3d at 414-18. As in *Deaton*, the Fourth Circuit based this ruling on its analysis of the scope of the federal navigation power. *Id.* Through the analysis in these two cases, the Fourth

Circuit recognized and applied the principle that the federal navigation power extends to any waters that have a physical connection to the navigable waters and, therefore, are part of the same aquatic system.

In two cases decided before its ruling in this case, the Sixth Circuit agreed with the rulings of the Fourth Circuit and analyzed the issue of CWA jurisdiction over a wetland in terms of the existence of a hydrological connection. *See United States v. Rapanos*, 376 F.3d 629 (2004), *cert. granted*, 546 U.S. ___; 126 S. Ct. 414 (2005); *United States v. Rapanos*, 339 F.3d 447 (2003), *cert. denied*, 541 U.S. 972 (2004). Both of the *Rapanos* cases arose from a property owner's decision to drain wetlands on his property, which was located at least eleven miles from the nearest navigable water but was connected to that water by the flow of surface water through several different non-navigable bodies of water. In the criminal case, which was decided first, the Sixth Circuit pointed out that "[t]he evidence presented in this case suffices to show that the wetlands on Rapanos' land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two." *Rapanos*, 339 F.3d at 453. Similarly, in the civil case, which was decided slightly more than two weeks before this case was argued in the Sixth Circuit and which has been consolidated with this case in this Court, the court rejected the property owner's argument that "direct abutment" was required to invoke CWA jurisdiction, holding that "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke [Clean Water Act] jurisdiction." *Rapanos*, 376 F.3d at 642. Thus, in both *Rapanos* cases, the Sixth Circuit relied upon a mode of jurisdictional analysis

that it disregarded in this case, focusing upon the existence of a hydrological connection to determine whether a wetland had a "significant nexus" with the navigable waters.

Other courts, ruling before and after *SWANCC*, have also concluded that the Act extends to wetlands that have, at the very least, a hydrological connection to the "waters of the United States." *See, e.g., United States v. Wilson*, 133 F.3d 251, 258 (4th Cir. 1997) (holding that a district court erred by instructing a jury that the CWA could apply to wetlands that lacked a direct or indirect hydrological connection to the navigable waters); *United States v. Buday*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 120-21 (E.D. Mich. 1981).

The Fifth Circuit and one district court have gone even farther in restricting the scope of federal authority over wetlands under § 404(a), holding that the CWA extends only to the navigable waters themselves and to non-navigable waters or wetlands that are immediately adjacent and hydrologically connected to the navigable waters. Nevertheless, these courts still recognize that a hydrological connection with the navigable waters is a necessary, if not sufficient, condition for establishing CWA jurisdiction over wetlands. Construing the CWA for the purpose of applying the Oil Pollution Control Act, the Fifth Circuit has held that *SWANCC* limited federal authority to wetlands that are adjacent to navigable waters. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). The

Fifth Circuit expressed the principle this way: "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. A district court has also followed the Fifth Circuit's reading of *SWANCC*, concluding that even some wetlands that have a hydrological connection to a navigable water may, nevertheless be classified as "isolated" and outside CWA jurisdiction. *FD & P Enters., Inc v. United States Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 514-16 (D. N.J. 2003). According to the *FD & P Enterprises* court, after this Court's ruling in *SWANCC*, it is adjacency to navigable water, along with a hydrological connection, that determines the scope of federal authority. *Id.*

By contrast to all of these opinions, the Sixth Circuit's opinion here marks a dramatic departure from the principles defining the scope of federal authority over navigable waters and from the manner in which the overwhelming majority of federal courts have understood the meaning of "significant nexus." Instead of focusing its jurisdictional analysis on the CWA as an instrument for the exercise of the federal navigation power, and instead of considering whether there was a hydrological connection between the wetland and any navigable water or tributary of a navigable water, the Sixth Circuit focused instead on the wetland's physical proximity to the drainage ditch that was connected to non-navigable tributaries of Lake St. Clair. Pet. App. 9a. Although the Sixth Circuit recognized that the identification of a "significant nexus" was essential to the definition of the scope of federal authority, the court presumed that such a nexus could be established simply by physical proximity and regardless of any ground or surface water connection. Pet. App. 9a-12a.

Only one other circuit court has held that federal jurisdiction under § 404(a) may be found over an adjacent wetland despite the absence of a hydrological connection and solely on the basis of physical proximity. In *Baccarat Fremont Developers v. United States Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), the Ninth Circuit relied heavily upon the Sixth Circuit's decision in this case and held that a wetland would still be considered adjacent to federal waters if it was separated from those waters by a man-made barrier. It concluded that *SWANCC* was not directly relevant to the construction of the concept of adjacency, and that there was no need to find the existence of a hydrological connection as a basis for concluding that a wetland was "adjacent" for the purposes of 33 C.F.R. § 328.3(a)(7). *Baccarat Fremont*, 450 F.3d at 1155-56. According to the Ninth Circuit, the CWA's jurisdictional requirements are satisfied if a wetland is adjacent to a navigable water, regardless of whether that wetland has a hydrological connection with the navigable water. *Id.*; *see also Northern California River Watch v. City of Healdsburg*, 2004 WL 201502, *9 (N.D. Cal. Jan. 23, 2004) (asserting that "*SWANCC* did not impose a rule of 'hydrological connection' . . . .").

The fundamental problem with the reasoning of the Sixth Circuit in this case and the Ninth Circuit in *Baccarat Fremont* is that they simply disregard the essential foundation for determining CWA jurisdiction after *SWANCC*: the identification of a nexus that links the subject of regulation to the navigable waters. As the other authority discussed in this section shows, the minimum requirement of such a nexus is the existence of a hydrological connection between the subject of regulation and the navigable waters, and without such a

connection, there is no statutory basis for the exercise of federal authority under the CWA.

E. Petitioners' Property Is Not Subject to Federal Authority under the CWA Because It Lacks a Hydrological Connection with the Navigable Waters.

The undisputed facts of this case leave no doubt that the wetland on Petitioners' property lacks the requisite nexus with the navigable waters to warrant CWA jurisdiction. Most importantly, the wetland has no hydrological connection to the navigable waters. Because the soil in the wetland is clay, water does not drain from the surface of the wetland to ground water; and it does not run off the surface of the wetland to the drainage ditch that abuts Petitioners' property. J.A. 36a-40a, 82a-83a, 99a-100a, 162a-163a. Moreover, the Corps itself found that the drainage ditch was not a tributary of a navigable water, and that the wetland did not even receive surface water run-off from other properties. J.A. 82a, 97a. In hydrologic terms, the wetland on Petitioners' property could not be more isolated, from the navigable waters of the United States, or from anything else. As a result, there can be no proximate cause between the regulation of the wetland and the protection of chemical, physical, or biological integrity of the channels of interstate commerce. *See* J.A. 35a-37a. Indeed, as the Corps admitted, the wetland has no connection of any kind with interstate commerce, other than the protection of migratory birds, which cannot be a basis for federal authority. J.A. 131a. The state administrative agency here even found that Petitioners' development plan,

with its enhanced wetland, would do more to fulfill the purposes of protecting clean water than the preservation of the property in its current condition. J.A. 35a-37a. In the absence of the barest relationship between Petitioners' property and the navigable waters, it is impossible for the Corps to fulfill the purposes of the CWA by regulating that property, and there is no basis in law for the Corps to exercise jurisdiction over the property. The Sixth Circuit erred in concluding that the CWA could apply to Petitioners' property, and this Court should reverse its judgment.

II. The Extension of Federal Authority Under the Clean Water Act to a Wetland That Lacks a Hydrological Connection with the Waters of the United States Exceeds the Boundaries of Congressional Authority Under the Commerce Clause.

For the reasons stated above, the CWA should be read to prohibit the extension of federal authority over hydrologically isolated wetlands because such an extension exceeds the scope of the federal navigation power, upon which the CWA is based. But even if the CWA is understood to be the product of Congress' more expansive power to regulate activities that substantially affect interstate commerce, the CWA still cannot be interpreted to provide for federal authority over wetlands that lack any ground or surface water connection to the navigable waters of the United States. As this Court held in *SWANCC*, the extension of federal authority to isolated, intrastate waters upsets the traditional balance between the state and federal governments regarding the regulation of land and water uses. Consequently, even if this Court concludes

that the CWA embodies Congress' general commerce power, it cannot be interpreted or applied to provide for the federal regulation of wetlands that lack any physical connection to interstate waters and, therefore, lack any substantial effect on interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), this Court reaffirmed the principles that define the scope of Congress' authority to regulate economic activities that have a substantial effect on interstate commerce. These cases establish that the federal commerce power may not be extended to regulate conduct in legal contexts where the States have traditionally exercised their police power and when the conduct sought to be regulated is not economic activity. When these principles are applied to the regulation of the dredging and filling of wetlands, they mandate the conclusion that the federal commerce power cannot be extended to hydrologically isolated wetlands. *See* Bradford C. Mank, *The Murky Future of the Clean Water Act after* SWANCC: *Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L. Q. 811 (2003); Michael J. Gerhardt, *Federal Environmental Regulation in a Post-*Lopez *World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980 (2000).

The analysis of what Congress may regulate under its Commerce Clause authority begins with the consideration of whether the regulated activity fits into one of "three broad categories of activity:" (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3) the power to regulate those activities having a

substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558-559. In this case, the activity regulated by § 404(a) and § 328.3(a)(7) – the dredging and filling of wetlands – must be classified in the third category if it is to be subject to the general commerce power. As discussed in the previous argument, if the dredging and filling of wetlands relates to the use of the channels of interstate commerce, it involves the federal navigation power, which has its own particular purposes and limits. And in no event can the dredging and filling of wetlands be classified as involving one of the instrumentalities of interstate commerce.

As this Court held in *Lopez*, Congress may regulate activities in the third category if they have a "'substantial economic effect'" on interstate commerce. *Lopez*, 514 U.S. at 556-57 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). To determine which activities have such a substantial effect, a court must further examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute's language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends. *Lopez*, 514 U.S. at 563-64.

A hydrologically isolated wetland, such as the wetland at issue in this case, cannot meet any of these tests for the existence of a substantial effect on interstate commerce. First, the dredging or filling of any wetland, in itself, does not relate to an economic activity. Although a person who dredges or fills a wetland may do so for the ultimate purpose of engaging in an economic activity, the act of dredging or filling is not inherently economic, and neither § 404(a) nor § 328.3(a)(7) distinguishes between dredging or filling

activities that do or do not have an ultimately economic purpose. The statute could be applied with equal force to a developer who sought to dredge or fill a vast area of wetlands as a prelude to building a shopping mall and to a home owner who sought to re-grade and fill a persistently saturated portion of his yard for purely aesthetic purposes. In both *Lopez* and *Morrison*, this Court concluded that Congress exceeded the limits of its authority under the Commerce Clause by attempting to regulate activities that were not inherently economic, even though they might – or might not – have consequences for the national economy. As with the possession of a firearm in a school zone or certain kinds of conduct constituting violence against women, the dredging or filling of a wetland does not necessarily have a commercial purpose, and, as such, it is the sort of conduct traditionally regulated by the police powers of the States, not by the federal power to regulate interstate commerce.

Second, there is nothing in § 404(a) nor § 328.3(a)(7) which constitutes a "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 562. Nothing in the CWA itself or in its attendant regulations would give the Corps or any other federal agency a method for distinguishing between wetlands that would substantially affect interstate commerce and wetlands that would not. If, as discussed in the previous argument, the CWA is understood as an exercise of Congress' navigation power, then the term "navigable waters" could be characterized as a jurisdictional element, restricting the scope of federal authority under the CWA to waters that are actually navigable and to waters or wetlands

that are, at the very least, hydrologically connected to the navigable waters. Indeed, the navigation power carries with it an inherent jurisdictional limitation that preserves State authority. *See California v. United States*, 438 U.S. 645, 662 (1978) (citing *Rio Grande Dam & Irrigation*, 174 U.S. at 709). If, however, the CWA is understood as an exercise of the general commerce power, there is nothing in the language of either the statutes or the regulations that would facilitate a jurisdictional limitation on the exercise of federal authority.

Finally, there is no cogent rationale for permitting the extension of federal authority under the CWA to wetlands without any hydrological connection to the navigable waters of the United States. Given that there is no flow of surface or ground water between the wetland in this case and any navigable water, there are only the most attenuated reasons for exercising CWA jurisdiction over the wetland. Preserving the wetland in its current condition will not prevent pollution in Lake St. Clair because the wetland is disconnected from the Lake St. Clair watershed and therefore cannot serve any filtering function for that navigable water. *See* J.A. 37a, 97a, 99a. In the administrative proceedings, the Corps suggested that, even without a hydrological connection, the wetland served flood control and water storage functions, preventing run off from other areas from entering the Lake St. Clair watershed, but the extent and importance of such functions are purely speculative. Indeed, there was no dispute in the administrative record that the wetland did not receive surface water run-off from neighboring properties, *see* J.A. 97a, so the flood control capacity of the wetland here was entirely a matter of conjecture. Moreover, if the federal

government could have jurisdiction over any piece of property which, if developed, might change the dynamics of surface water flow and flood control, then the scope of federal authority would be extraordinarily broad and would interfere with the States' ability to fulfill their core function as the primary regulators of land use. In short, giving the Corps authority to regulate land on the basis of *potential* hydrological connections would, in effect, give the federal government police power over land use, which would equal or exceed the police power of State governments. Such a profound intrusion by the federal government into the power traditionally vested in the States weighs heavily against the conclusion that the regulation of hydrologically isolated wetlands is necessary and proper to protect interstate commerce. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997).

Indeed, this case precisely demonstrates the nature of such an intrusion. Before the Corps ever considered exercising its authority over the wetland here, the Michigan Department of Environmental Quality (MDEQ) granted Petitioners' state-law application to develop the property. In making its decision, the MDEQ evaluated a variety of ecological factors, particularly whether and to what extent the filling of the wetland on the Petitioners' property might affect the Lake St. Clair watershed. After this consideration, it was the judgment of the authorized state agency that petitioners' proposed use of the property would not adversely affect any of the state's interests. In particular, the state officials considered issues relating to flood control, especially because the wetland is close to the drain system for Macomb County. J.A. 36a-40a. In this respect, the contrast between the decision-making of the federal and state

agencies is instructive. The state agency approved Petitioners' development plan after focusing on issues of central importance to the use and protection of Lake St. Clair. In fact, the state agency concluded that the enhanced wetland that was a part of Petitioners' development plan was more likely to serve water filtering functions than the wetland in its current condition. J.A. 35a. The Corps, on the other hand, devoted less attention to issues of pollution effects and more attention to questions about whether the proposed condominium development was really necessary for the local economy. J.A. 115a-116a. Most tellingly, the Corps even acknowledged that the wetland had no meaningful connection with interstate commerce, except as a habitat for migratory birds. J.A. 131a. In this respect, the state agency functioned more like a body concerned with pollution control and the federal agency functioned like a super-zoning board. The Commerce Clause simply does not give federal agencies the authority to engage in this kind of decision-making. Given that the wetland here has no demonstrable connection to any interstate water or to anything else that would substantially affect a federal interest, it is inconsistent with the fundamental principles underlying the Commerce Clause for the federal government to regulate this wetland, or any other wetland that lacks a hydrological connection to the waters of the United States.

CONCLUSION

Although it is broad, federal authority under the Commerce Clause does not have an unlimited scope. In this case, the Corps exceed the scope of this authority by denying the Petitioners a permit to fill their wetland

under § 404(a) of the CWA. Petitioners' wetland does not have any physical connection to the navigable waters of the United States, and, therefore, it cannot substantially affect either the channels of interstate commerce or interstate commerce itself. By asserting its authority over the wetland on Petitioners' property, the Corps exceeded the limits of federal power and intruded into an area reserved for the exercise of state police power. This Court should reverse the judgment of the Sixth Circuit and rule that the lower courts erred by failing to recognize that the CWA does not permit the regulation of hydrologically isolated wetlands.

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Respectfully Submitted,

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Attorneys for Petitioners

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JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
GREER S. GOLDMAN
ELLEN J. DURKEE
TODD S. KIM
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the United States Army Corps of Engineers acted reasonably in interpreting the term "waters of the United States" as it appears in the Clean Water Act (CWA), 33 U.S.C. 1362(7), to encompass a wetland that is "adjacent" to, but separated by a narrow man-made berm from, a tributary that is covered by the CWA.

2. Whether the application of the CWA to the wetland at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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In the Supreme Court of the United States

No. 04-1384

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 391 F.3d 704. The opinion of the district court (Pet. App. 15a-17a) and the report and recommendation of the magistrate judge (Pet. App. 20a-57a) are reported at 257 F. Supp. 2d 917.

JURISDICTION

The court of appeals entered its judgment on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday), and was granted on October 10, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[1] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). It defines the term "pollutant" to mean, *inter alia*, dredged spoil, rock, sand, and cellar dirt. 33 U.S.C. 1362(6). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The Clean Water Act establishes two complementary permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers

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[1] The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA enacted in 1977 changed the popular name of the statute to the Clean Water Act. See Pub. L. No. 95-217, 91 Stat. 1566; 33 U.S.C. 1251 note. This brief will refer to the statute in its current form as the Clean Water Act or CWA; the brief will refer to earlier amendments as the FWPCA Amendments.

(Corps), to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by state officials. 33 U.S.C. 1344(g). The discharge of pollutants other than dredged or fill material may be authorized by the Environmental Protection Agency (EPA), or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program, pursuant to Section 402 of the CWA. 33 U.S.C. 1342.

2. The instant case involves the construction of the statutory term "the waters of the United States."

a. For purposes of the Section 402 and 404 permitting programs, the current EPA and Corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The Corps defines that term to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce * * * ;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s)(1) (EPA).[2]

The Corps' regulations define the term "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). The regulations further specify that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Ibid.*

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[2] For simplicity, this brief will refer solely to 33 C.F.R. 328.3(a), the Corps' regulatory provisions implementing Section 404. To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3(a), and the use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

b. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), and subsequently in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In *Riverside Bayview*, the Court framed the question before it as "whether the [CWA], together with certain regulations promulgated under its authority by the [Corps], authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." *Id.* at 123. The Court sustained the Corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. See *id.* at 131-135.

The Court in *Riverside Bayview* observed that Congress, by defining the term "navigable waters" to mean "the waters of the United States," had expressed its intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. After noting the Corps' scientific judgment that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality," *ibid.*; see *id.* at 133-134, the Court held that,

> [i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judg-

ment that adjacent wetlands may be defined as waters under the Act.

Id. at 134.

The Court in *Riverside Bayview* acknowledged the possibility that "not every adjacent wetland is of great importance to the environment of adjoining bodies of water." 474 U.S. at 135 n.9. The Court found, however, that so long as the Corps' approach reflects a reasonable understanding of the *typical* relationship between wetlands and adjacent water bodies, the existence of unusual cases "does not seriously undermine the Corps' decision to define all adjacent wetlands as 'waters.'" *Ibid.* The Court explained that, "where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." *Ibid.* The Court "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. The Court declined, however, "to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-132 n.8.

In *SWANCC*, this Court addressed an aspect of the question reserved in *Riverside Bayview* and rejected the Corps' construction of the term "waters of the United States" as encompassing "isolated," nonnavigable, intrastate ponds based solely on their use as habitat for migratory birds. 531 U.S. at 171-172. The Court quoted with apparent approval its prior holding that "Congress' concern for the protection of water qual-

ity and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). The Court explained, however, that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. *Id.* at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

3. Petitioners own a tract of 19.61 acres in Chesterfield Township in Macomb County, Michigan. Pet. App. 2a. One of the last large forested wetlands in Macomb County covers 15.96 acres of the property. *Ibid.* That wetland is a remnant of prehistoric Lake St. Clair, which now lies about a mile to the southeast. *Ibid.*; J.A. 91a-92a.[3]

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[3] In prehistoric times, much of what is now Macomb County was submerged under the lake. Pet. App. 2a; J.A. 91a. As the lake receded, some areas remained covered by wetlands. Pet. App. 2a; J.A. 91a. Since the early 1800s, however, Macomb County has lost most of its wetlands. J.A. 67a. Forested wetlands, which provide unique ecological

The property is in the shape of a right triangle. Pet. App. 2a. An unnamed ditch runs along the hypotenuse, from the southwest to the northeast corner of the property. *Id.* at 2a-3a. The ditch appears to have been excavated from the wetland approximately 50-60 years ago, see *id.* at 62a, at which time the excavated material was "cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch," *id.* at 3a. "The berm edging the [petitioners'] property serves to block immediate drainage of surface water out of the parcel into the ditch." *Ibid.* The berm may be overtopped when water levels are particularly high, however, and it contains drainage cuts that facilitate water flow from the wetland into the ditch. J.A. 186a-187a. The berm is the only separation between the wetland and the ditch. Pet. App. 9a.

At the northeastern corner of petitioners' property, the ditch connects with the Sutherland-Oemig Drain, through which water flows throughout the year. Pet. App. 3a; J.A. 95a. The Sutherland-Oemig Drain flows into Auvase Creek, which in turn flows into Lake St. Clair. Pet. App. 3a. Lake St. Clair "is part of the Great Lakes drainage system," *ibid.*, and is a traditional navigable water, *id.* at 56a-57a.

4. In 1993, petitioners applied to the Michigan Department of Environmental Quality (MDEQ), which administers an EPA-approved CWA program (40 C.F.R. 233.70; see 33 U.S.C. 1344(g)-(h)), for a permit to fill the wetland to facilitate construction of a 130-unit condominium complex. Pet. App. 3a. Both EPA and the United States Fish and Wildlife Service (FWS) filed

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benefits and take decades to regenerate once lost, are particularly scarce. J.A. 67a, 79a, 102a-104a; Pet. App. 74a.

comments opposing the application. *Ibid.* MDEQ initially denied the application, but a state administrative law judge directed it to issue a permit allowing a 112-unit complex. *Id.* at 3a-4a. Under the CWA and implementing regulations, however, EPA's continuing objection required petitioners to seek the Corps' approval as well. *Id.* at 4a; see 33 U.S.C. 1344(j); 40 C.F.R. 233.50(j).

In August 1999, petitioners applied to the Corps for a permit to fill the wetland in order to build the condominium complex. Pet. App. 4a; C.A. App. 32-40. The application indicated that petitioners would fill 15.87 acres of wetland while dredging and replanting 3.74 acres to create new wetlands. Pet. App. 4a. Petitioners also proposed to connect two of the areas of replanted wetlands directly to the ditch to allow the exchange of water. C.A. App. 38-40; J.A. 95a. Various parties, including EPA, FWS, the Lake St. Clair Advisory Committee, and the Water Quality Unit of the Macomb County Prosecutor's Office, objected to the permit application. J.A. 60a-80a.

In September 2000, after three site inspections, the Corps issued its permit evaluation. Pet. App. 4a; J.A. 84a-126a. That evaluation explained, *inter alia*, that

> [w]etlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area. Spoils from the ditch were sidecast, creating a dike which serves to block immediate drainage out of the parcel and holding water until [it] is quite high. By holding the water which falls onto the approximately 20 acre site and preventing it from immediately entering the surface water

> system, flood peaks to downstream areas are reduced.

J.A. 93a. The Corps concluded that petitioners' proposed development activities would have substantial negative impacts on water quality, terrestrial wildlife, and the overall ecology, as well as lesser effects regarding downstream erosion and sedimentation, flood hazards and floodplain values, and aquatic wildlife. J.A. 96a-115a; Pet. App. 4a.

In October 2000, the Corps officially notified petitioners that it had denied their permit application. Pet. App. 4a-5a. The Corps found that petitioners' proposed filling activities were subject to the CWA because, *inter alia*, the relevant wetland is "adjacent to a drain which empties directly into a [traditional navigable] water." *Id.* at 69a.[4] In summarizing the reasons for its denial of the permit application, the Corps stated: "Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." *Id.* at 70a; see *id.* at 73a-74a. In light of the anticipated negative effects of the proposed discharges on

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[4] The Corps' initial denial of petitioners' permit application was issued before this Court's decision in *SWANCC*. In finding that petitioners' proposed discharge was subject to the CWA, the Corps relied in part on record evidence "establish[ing] the site as being used for interstate commerce (neo-tropical migratory bird stopping point)." Pet. App. 69a. In its subsequent decision denying petitioners' administrative appeal, the Corps recognized that this Court's intervening decision in *SWANCC* "negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters." *Id.* at 63a. The Corps concluded, however, that "[t]he SWANCC decision is not relevant to [petitioners'] proposal because the subject wetlands are not isolated." *Ibid.*

"water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology," the Corps concluded that "the detriments greatly outweigh the benefits to the overall public interest." *Id.* at 70a-71a; see *id.* at 5a.

In December 2000, petitioners filed an administrative appeal from the denial of their permit application. Pet. App. 5a, 59a. Petitioners argued "that the Corps lacked regulatory jurisdiction over the property because the wetlands were purportedly isolated from all outside waters by [the] spoil berm." *Id.* at 5a. Petitioners further contended that the MDEQ's issuance of a state permit foreclosed the Corps from reaching a contrary decision, and that "the Corps should have issued [petitioners] a permit because their proposed activities met all statutory and regulatory requirements." *Ibid.*

In March 2001, the Corps denied the administrative appeal. Pet. App. 58a-68a. The Corps found that petitioners' proposed filling activities were subject to the CWA because the wetland on their property is "adjacent to a surface tributary system of a navigable waterway, Lake St. Clair." *Id.* at 61a; see *id.* at 60a-64a. The Corps explained that "the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency [under 33 C.F.R. 328.3(c)]." *Id.* at 62a. In rejecting petitioners' challenge to the merits of the permit denial, the Corps referred with apparent approval to the prior administrative findings that, "[b]esides the effects on wildlife habitat and water quality, * * * the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology." *Id.* at 66a.

5. In July 2001, petitioners filed suit in the United States District Court for the Eastern District of Michi-

gan, challenging the Corps' denial of their permit application. Pet. App. 6a; C.A. App. 6. Petitioners alleged, *inter alia*, that the Corps and EPA lacked regulatory jurisdiction over their proposed filling activities because the wetland on their property was not part of "the waters of the United States" within the meaning of the CWA. *Id.* at 15-16. The case was referred to a magistrate judge, and the parties submitted cross-motions for summary judgment. Pet. App. 6a.

The magistrate judge entered a report and recommendation that the district court grant summary judgment to the Corps and EPA. Pet. App. 20a-57a. With respect to the applicability of the Clean Water Act, the magistrate judge concluded that, "because [petitioners'] property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." *Id.* at 49a. The magistrate judge further recommended that petitioners' challenge to the merits of the Corps' permitting decision be rejected. *Id.* at 50a-55a. The magistrate judge explained, *inter alia*, that "[t]he cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in [the local area] to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems." *Id.* at 51a. The district court adopted the magistrate judge's report and recommendation and entered judgment in favor of the Corps and EPA. *Id.* at 15a-17a.

6. The court of appeals affirmed. Pet. App. 1a-13a. The court held that, under the CWA and implementing regulations, the Corps has regulatory authority over petitioners' proposed discharges because the wetland on

their parcel is adjacent to tributaries of a traditional navigable water. *Id.* at 9a-10a. The court recognized in particular that, under 33 C.F.R. 328.3(a)(7), a wetland separated from a tributary only by a berm or other man-made barrier remains "adjacent" to that tributary. Pet. App. 9a-10a. The court of appeals also concluded that this Court's decision in *SWANCC* did not cast doubt on the validity of the Corps and EPA regulations governing "adjacent wetlands," which this Court had upheld in *Riverside Bayview*. *Id.* at 10a-12a. The court of appeals upheld the district court's determination that "there is a 'significant nexus' between the wetland on the [petitioners'] property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States." *Id.* at 12a.

Petitioners also contended that, even if their proposed discharges were subject to the permitting requirements of the CWA, the district court had erred by failing to set aside the Corps' adverse ruling on the merits of their permit application. Pet. App. 13a. The court of appeals agreed with the district court "that the Corps' decision was neither arbitrary nor capricious," and it therefore found "no basis for disturbing the district court's determination." *Ibid.*

SUMMARY OF ARGUMENT

A. The Corps' assertion of permitting authority over wetlands that are physically adjacent—*i.e.*, "bordering, contiguous, or neighboring"—to a covered water body, even when a berm or similar feature lies between the wetland and the adjacent waters, reflects a reasonable interpretation of the CWA. This Court has already upheld the assertion by the Corps and EPA of jurisdiction

over wetlands adjacent to regulable bodies of water. And the pertinent regulations have long looked to whether waters are physically adjacent without regard to berms or similar features.

The terms of the CWA leave the Corps and EPA with substantial discretion to define the precise connection to traditional navigable waters that is necessary to bring particular wetlands within the Act's coverage. Congress's use of the term "adjacent" in later amendments to the Act suggests acquiescence not only in the general proposition that pollution discharges into "adjacent wetlands" require a CWA permit, but also in the regulatory definition of the term "adjacent wetlands" that the Corps had recently adopted when those amendments were enacted. Deference to the agencies' judgment is also appropriate because defining the class of wetlands that are likely to be important to the larger aquatic environment implicates the technical expertise of the Corps and EPA.

The hypothetical prospect that a berm or similar feature might occasionally sever all hydrologic connection between a wetland and adjacent waters does not render the Corps' approach invalid. This Court has recognized that the Corps and EPA, in identifying "the waters of the United States" for purposes of the CWA, may rely on categorical judgments about the classes of waters that are potentially important to the larger aquatic environment. The regulatory definition of "adjacent wetlands" reflects the expert agencies' determination that pollution of wetlands "bordering, contiguous, or neighboring" to other covered waters will typically threaten the quality of those adjacent waters, even when a berm or dike runs between them. That generalization is supported by substantial scientific evidence and fully

supports a decision about the proper scope of federal *jurisdiction* to consider whether (and under what conditions) a permit should be granted.

Although cases may occasionally arise in which the effect of a berm or similar feature is to negate a wetland's importance to adjacent waters, evidence that a particular feature has that effect is properly treated as a justification for granting a CWA permit allowing the discharge to occur, rather than as a ground for excluding the wetland from CWA jurisdiction. That approach provides clear guidance to regulated parties and ensures that the threshold jurisdictional question can be resolved through a clear and easily administrable standard. It also avoids the significant enforcement difficulties that might otherwise exist if an unpermitted discharge obscured or destroyed physical evidence concerning whether there was, in fact, a hydrologic connection between wetlands and adjacent waters.

B. Petitioners' constitutional challenge was neither pressed nor passed upon below, and it therefore is not properly before this Court. In any event, application of the CWA to petitioners' wetlands is a permissible exercise of congressional power under the Commerce Clause. Federal protection of wetlands adjacent to tributaries may be sustained both as regulation of the "channels" of interstate commerce, and as regulation of a class of activities having a substantial aggregate effect on interstate commerce. Congress's authority does not turn on either the existence or the permeability of the berm running between petitioners' wetlands and the adjacent tributary. The Corps and EPA have determined that such features generally do not negate a wetland's importance to the larger aquatic environment,

and petitioners have identified no basis on which that determination could be deemed irrational.

ARGUMENT

THE CORPS HAS ACTED LAWFULLY IN DEFINING THE TERM "ADJACENT WETLANDS" TO INCLUDE WETLANDS THAT ARE PHYSICALLY ADJACENT TO OTHER WATERS COVERED BY THE CWA BUT ARE SEPARATED FROM THOSE WATERS BY A BERM OR SIMILAR FEATURE

This case has been consolidated with *Rapanos* v. *United States*, cert. granted, No. 04-1034 (Oct. 11, 2005), and the two cases share significant issues in common. Each case presents the question whether the Corps may lawfully exercise permitting authority under the CWA with respect to point-source pollutant discharges into wetlands that are "adjacent," generally defined by the Corps' regulations to mean "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)), to tributaries of traditional navigable waters. Our brief in *Rapanos* explains (at 17-37) that the regulatory provisions defining the term "waters of the United States" to include tributaries and their adjacent wetlands are consistent with the text, history, and purposes of the CWA, and with this Court's decisions construing the Act. Our brief in *Rapanos* further explains (at 38-49) that the CWA, as applied to the wetlands at issue in that case, is a permissible exercise of congressional authority under the Commerce Clause.

This case implicates one aspect of the Corps' regulations that *Rapanos* does not. The regulatory definition of "adjacent" states that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c). Although no such feature was present in *Rapanos*, an earthen

berm approximately four feet wide runs between petitioners' wetlands and the neighboring tributary. Thus, the instant case presents an additional question concerning the validity of the Corps' assertion of regulatory authority over wetlands adjacent to a regulable waterway (here a tributary) but separated from it by a berm or similar feature.[5] For the reasons that follow, the Corps' regulatory approach is consistent with the CWA, and the Act's application to petitioners' wetlands is a permissible exercise of Commerce Clause authority.

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[5] Petitioners suggest in passing that a Corps site-inspection report indicated that the unnamed ditch to which the wetland is adjacent is not a "tributary." See Pet. Br. 8, 39 (citing J.A. 82a, 97a). The cited pages do not support petitioners' characterization of the Corps' report. J.A. 82a-83a. Moreover, the Corps in later decision documents found that the ditch is part of Lake St. Clair's tributary system. Pet. App. 59a, 61a-62a, 69a. The courts of appeals have consistently held that, for purposes of the regulatory definition of "waters of the United States," a man-made ditch can be a "tributary" of the downstream waters to which the ditch ultimately contributes flow. See, *e.g.*, *United States* v. *Gerke Excavating, Inc.*, 412 F.3d 804, 805-806 (7th Cir. 2005), petition for cert. pending, No. 05-623 (filed Nov. 11, 2005); *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Treacy* v. *Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States* v. *Rapanos*, 339 F.3d 447, 449, 451-452 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States* v. *Deaton*, 332 F.3d 698, 710-712 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United States* v. *Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974). But cf. *In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003) ("[T]he term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway.").

A. The Corps' Assertion Of CWA Permitting Authority Over Petitioners' Wetlands Is Reasonable And Consistent With The Act

Petitioners' fundamental submission is that the CWA does not extend to wetlands that lack a hydrologic connection to traditional navigable waters or their tributaries, and that the wetland at issue here, notwithstanding its geographic adjacency to a tributary, lacks such a hydrologic connection because it is separated from that tributary by a berm. Petitioners' submission is without merit. As an initial matter, petitioners' wetland has not been found to lack a hydrologic connection to the adjacent tributary, and the record evidence is to the contrary.

In any event, while the Corps and EPA might have focused on hydrologic connection as the key to defining the scope of the CWA, the agencies have permissibly adopted a different approach. The Corps and EPA regulations that assert jurisdiction over wetlands that are "adjacent" to other jurisdictional waters, without regard to the presence of hydrologic connections or the absence of features such as berms, reflect a reasonable and valid interpretation of the Act. As a class, "adjacent wetlands" generally have hydrologic connections with, and contribute to the quality of, the waters to which they are adjacent. Those generalizations remain true even when the wetlands are separated from the adjacent waters by man-made features like the berm on petitioners' property. The regulations embody the agencies' expert judgment that such features generally do not block the passage of water altogether, but rather allow either surface or subsurface flow (or both). And, of course, when that generalization proves inapplicable to a particular

adjacent wetland, the Corps and EPA can take that fact into account in the permitting process.

Thus, the question here is not whether the Corps may regulate the discharge of fill into a wetland solely because of its proximity to another water with which it demonstrably lacks any hydrologic connection. Rather, the question is whether the Corps and EPA may rely on the concept of "adjacency," which serves as a reasonable proxy for the presence of a hydrologic connection and for the importance of the wetland to the surrounding aquatic environment, to assert regulatory jurisdiction and thereby require those who wish to discharge pollutants into adjacent wetlands to seek permits.

1. The Record Does Not Support Petitioners' Claim That No Hydrologic Connection Exists Between Their Wetland And The Adjacent Tributary

Petitioners repeatedly assert (*e.g.*, Br. 4-5 & n.1, 12, 39-40) that the absence of any hydrologic connection between their wetlands and the adjacent ditch is either undisputed or at least clearly established. That is incorrect. Although the presence or absence of such a link was not a principal point of contention during the administrative or judicial proceedings below, the pertinent record evidence indicates that the wetland on petitioners' tract has at least an occasional hydrologic connection to the unnamed ditch and thus to Lake St. Clair, a traditional navigable water.

The Corps concluded that the small berm lying between the wetland and the adjacent ditch "serves to block *immediate* drainage out of the parcel and hold[s] water *until it is quite high.*" J.A. 93a (emphasis added). The court of appeals likewise stated that the berm "serves to block *immediate* drainage of surface water out of the parcel into the ditch." Pet. App. 3a (emphasis

added). Neither the Corps nor the courts below described the berm as blocking *all* water movement from the wetland to the ditch, and the evidence in the record supports the opposite conclusion. In particular, petitioners' expert stated in the administrative record that "I think you would start seeing some overflow" of water from the wetland to the ditch in some circumstances, and petitioners' attorney conceded that "drainage cuts that run through that berm" would facilitate such flow. J.A. 186a-187a.[6]

With respect to the purported absence of a hydrologic connection between the wetland and the ditch, therefore, petitioners can demonstrate no more than the following: First, under the applicable regulations, a CWA permit is required for a discharge of pollutants into wetlands that are "bordering, contiguous, or neighboring" to any other covered waters. Where that close physical proximity exists, the regulations do not require proof of a hydrologic connection between the wetlands and adjacent waters in order for the wetlands to be treated as part of "the waters of the United States." Second, neither the Corps nor the courts below made any explicit finding as to whether petitioners' wetlands are hydrologically connected to other covered

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[6] Petitioners rely (Br. 5) on the Corps' statements in its permit evaluation that "the parcel is not currently part of the [Sutherland-Oemig] Drain watershed" and that the wetland is "isolate[d]" from downstream waters. J.A. 99a, 106a. But given the statement earlier in the same document that the berm serves to hold water only "until it is quite high," those statements are most naturally read to indicate only that there is no surface water connection between the wetland and the ditch under typical conditions. Similarly, a Corps official's statement during an administrative appeal hearing that the parcel is "[e]ssentially * * * off-line" (J.A. 187a) does not imply that water never moves between the wetland and the ditch.

waters (although the record suggests the existence of such a connection). This case therefore involves the application of the CWA permitting requirement to pollutant discharges into wetlands "bordering, contiguous, or neighboring" to a covered tributary when the presence *or* absence of a hydrologic connection between the wetlands and the tributary has not been definitively established.

2. The Conclusion That The CWA Encompasses "Adjacent Wetlands" As Defined In The Agencies' Regulations Is Consistent With The Statutory Text And With This Court's Construction Of The CWA

The term "the waters of the United States" appears in the CWA as the definition of the phrase "navigable waters." 33 U.S.C. 1362(7). In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), the Court observed that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133. In *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), however, the Court subsequently made clear that the word "navigable" cannot be treated as pure surplusage. See *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). Rather, the Court explained, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

The Court in *SWANCC*, however, did not state precisely *what* connection to traditional navigable waters must exist before discharges into nonnavigable water

bodies may be regulated under the CWA. One approach might have been to tie the scope of the CWA to traditional navigable waters and all waters with a hydrologic connection to those waters. That is the approach petitioners favor. But that approach could raise serious difficulties, both because it would be difficult to administer (hydrologic connections often are neither readily apparent nor easy to prove, see pp. 33-36, *infra*) and because it would ignore other ways in which adjacent wetlands can impact traditional navigable waters, see pp. 28-29, *infra*. The Corps and EPA adopted a different approach that focuses on readily identifiable measures of physical proximity to regulable waters.

That approach was well within the agencies' discretion. Even when construed in light of Congress's general focus upon traditional navigable waters, "[t]he statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*." *United States* v. *Deaton*, 332 F.3d 698, 709-710 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). The fact that a particular wetland is "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)) to a covered water body is itself a significant connection between the two. Because the text of the CWA does not explicitly state whether that connection is a sufficient basis for the Corps' exercise of regulatory authority over pollutant discharges into adjacent wetlands, or whether some additional link is required, the Corps' resolution of that question is entitled to deference from a reviewing court.

Of course, this Court does not write on a blank slate in considering the reasonableness of a decision to in-

clude wetlands adjacent to regulable waters within the scope of the CWA. Although *Riverside Bayview* did not involve a berm, the Court upheld the basic regulatory approach of including adjacent wetlands within the scope of the CWA. And while *Riverside Bayview* involved a "navigable waterway" (474 U.S. at 131), the logic of petitioners' argument is not limited to wetlands adjacent to nonnavigable tributaries, but would suggest that even wetlands adjacent to traditional navigable waters fall outside the CWA if a berm severs the hydrologic connection between the two. That argument is difficult to square with the Court's reasoning in *Riverside Bayview*. See pp. 29-30, *infra*.

Other language in the CWA, moreover, suggests that Congress acquiesced in the concept of adjacency that is reflected in the Corps and EPA regulations. Under Section 404(g), States are authorized to assume responsibility for administration of the Section 404 permitting program with respect to "navigable waters (other than [traditional navigable waters], *including wetlands adjacent thereto*)." 33 U.S.C. 1344(g)(1) (emphasis added). That provision was enacted in 1977, some months after the Corps' issuance of final regulations that specified that "adjacent wetlands" include wetlands that border neighboring waters but are separated from them by a berm or similar feature.[7]

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[7] Final regulations published by the Corps on July 19, 1977, defined the term "adjacent wetlands" to include "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." See 42 Fed. Reg. 37,144. The debates that culminated in the 1977 FWPCA Amendments reflected Congress's awareness of the 1977 regulations. See, *e.g.*, 123 Cong. Rec. 38,968 (1977) (House debate); *id.* at 26,718 (Senate debate).

In both the Senate and the House of Representatives, debates on the legislative proposals that culminated in the 1977 FWPCA Amendments (which included Section 404(g)) "centered largely on the issue of wetlands preservation." *SWANCC*, 531 U.S. at 170 (quoting *Riverside Bayview*, 474 U.S. at 136). The text and history of those Amendments indicate that "Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands." *Riverside Bayview*, 474 U.S. at 138. It is unlikely that Congress, in generally acceding to the Corps' inclusion of adjacent wetlands within the regulatory definition of "waters of the United States," intended to disapprove the precise definition of "adjacent wetlands" set forth in the text of the regulations. See, *e.g.*, *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning.").[8]

Judicial deference to the regulatory definition is appropriate not only because of the relative imprecision of the statutory language and Congress's apparent acqui-

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[8] Other CWA provisions employ the word "adjacent" in its usual sense of neighboring or proximate. See, *e.g.*, 33 U.S.C. 1272(a) (EPA may remove "contaminated sediments outside the boundaries of and adjacent to the navigation channel"), 1281(n)(2), 1285(*l*)(2) ("adjacent urban complexes"), 1311(h)(9) ("waters surrounding or adjacent to the point at which such effluent is discharged"), 1329(b)(1) ("adjacent States"), 1346(a)(1)(A), (b)(1), (c)(1), (d), (g)(1) ("coastal recreation waters adjacent to beaches or similar points of access"). Congress has used different terminology in CWA provisions that require a hydrologic connection. See, *e.g.*, 33 U.S.C. 1254(n)(4) (Supp. II 2002) (defining "estuary" with reference to "natural connection with open sea"), 1362(21)(B)(ii) ("waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea").

escence in the regulatory coverage of "adjacent wetlands," but also because the question presented here implicates the "Corps' and EPA's technical expertise." *Riverside Bayview*, 474 U.S. at 134. As a general matter, inclusion of adjacent wetlands within the regulatory definition of "waters of the United States" reflects the agencies' expert judgment that "adjacent wetlands are inseparably bound up with the 'waters' of the United States," in the sense that "wetlands may affect the water quality of adjacent lakes, rivers, and streams." *Ibid.* *Inter alia*, "wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion." *Ibid.* (citations omitted). Defining the class of wetlands that are likely to perform those functions—and, in particular, determining whether pollution of wetlands separated from neighboring tributaries by berms or similar features is generally likely to affect the quality of the neighboring waters—are tasks far better suited for administrative than for judicial resolution.

3. CWA Coverage Of Wetlands Separated From "Adjacent" Waters By Berms Or Dikes Is Supported By Scientific Evidence and Agency Experience Demonstrating The Interrelated Nature of Such Adjacent Waters

The expert judgment of the agencies charged with administering the CWA is that pollution of wetlands "bordering, contiguous, or neighboring" to other covered waters will typically threaten the quality of those adjacent waters, even when the two are separated "by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c); see 42 Fed. Reg. 37,128 (1977) (explaining that "Federal jurisdiction un-

der Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."). That judgment is supported by substantial scientific evidence.

a. Berms and similar features typically do not block *all* water flow. Indeed, even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself.[9] As an agency with expertise and responsibilities in engineering and public works, the Corps extensively studies water retention structures like berms, levees, and earth and rock-fill dams. The agency has found that all water retention structures are subject to seepage through their foundations and abutments.[10] The inevitability of

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[9] See, *e.g.*, International Atomic Energy Agency, *Fact Sheet on Investigating Leaks in Dams & Reservoirs* (visited Jan. 11, 2006) ("All dams are designed to lose some water through seepage.") <http://www-tc.iaea.org/tcweb/publications/factsheets/sheet20dr.pdf>; U.S. Bureau of Reclamation, Provo Office, *Safety of Dams* (visited Jan. 11, 2006)("All dams seep, but the key is to control the seepage through properly designed and constructed filters and drains.") <http://www.usbr.gov/uc/provo/progact/damsafety.html>; Federal Energy Regulatory Comm'n (FERC), *Engineering Guidelines for the Evaluation of Hydropower Projects* 14-36 to 14-39 (2005) ("Seepage through a dam or through the foundations or abutments of dams is a normal condition.") <http://www.ferc.gov/industries/hydropower/safety/eng-guide/chap14.pdf>.

[10] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control for Dams* 1-1 (1986) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1901/entire.pdf>; U.S. Army Corps of Eng'rs, *General Design and Construction Considerations for Earth and Rock-Fill Dams* 6-1 (2004) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-2300/entire.pdf>; U.S. Army Corps of

seepage is a consequence not of poor design, but of physics: water will flow downward where it can and thus will seep through small spaces in the structure and in the ground beneath it.[11] Thus, good engineering practices do not entail the prevention of all seepage; rather, they assume seepage and entail steps to manage it so that it will not compromise the integrity of berms, levees, and dams.[12]

b. Even in the unlikely event that a particular wetland lacks any surface connection to a "bordering, contiguous, or neighboring" water body, a subsurface connection between the two is highly likely to exist. Below ground level, water tends to flow into a wetland from uphill areas and from a wetland to downhill areas, and

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Eng'rs, *Design, Construction, and Maintenance of Relief Wells* 1-1 (1992) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1914/entire.pdf>. This Court recently recognized that a canal and an impoundment area separated by levees were hydrologically connected (and might even be considered a single water body) because, *inter alia*, the "levees continually leak." *South Florida Water Mgmt. District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004).

[11] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control of Dams*, *supra*, at 4-1 to 4-26; U.S. Army Corps of Eng'rs, *Design and Construction of Levees* app. B (2000) <http:// www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1913/entire.pdf>.

[12] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control for Dams*, *supra*, at 7-1 to 14-3; U.S. Army Corps of Eng'rs, *General Design and Construction Considerations for Earth and Rock-Fill Dams*, *supra*, at 2-1, 6-1 to 6-7; U.S. Army Corps of Eng'rs, *Design and Construction of Levees*, *supra*, at 5-1 to 5-11, app. C; U.S. Army Corps of Eng'rs, *Design, Construction, and Maintenance of Relief Wells*, *supra*, at 1-1; U.S. Army Corps of Eng'rs, *Engineering and Design: Design Guidance for Levee Underseepage* 1-9 (2005) <http://www.usace.army.mil/usace-docs/eng-tech-ltrs/etl1110-2-569/entire.pdf>; FERC, *Engineering Guidelines for the Evaluation of Hydropower Projects*, *supra*, at 14-36 to 14-39.

such flow will typically connect wetlands with nearby waters.[13] Such subsurface connections can have significant practical effects. For instance, wetlands that have subsurface connections with downstream waters may serve as nutrient sinks that protect the quality of those waters even in the absence of a surface connection.[14] Indeed, petitioners concede (Br. 12-13, 19, 29) that either a surface or a subsurface hydrologic connection to a covered water may support inclusion of a wetland within "the waters of the United States" under the CWA.

c. When a berm or dike separates a wetland from a traditional navigable water or a tributary, the wetland's capacity to absorb water may be all that prevents unusually high waters from overtopping the barrier. The wetland may thus deter flooding and trap pollutants and sediment that would otherwise reach the adjacent waters. See *Riverside Bayview*, 474 U.S. at 134-135 (adjacent wetlands serve, *inter alia*, "to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion"); 33 C.F.R. 320.4(b)(2)(v). Along the Mississippi River and near San Francisco, for instance, vast areas of wetlands behind dikes and levees serve functions including flood protection.[15] In such cir-

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[13] See, *e.g.*, National Research Council, *Riparian Areas: Functions and Strategies for Management* 33-34 & fig. 1-4, 58-68 & fig. 2-11 (2002) <http://www.nap.edu/books/0309082951/html>.

[14] See, *e.g.*, National Research Council, *Compensating for Wetland Losses under the Clean Water Act* 50 (2001) <http://www.nap.edu/books/0309074320/html>; National Research Council, *Riparian Areas: Functions and Strategies for Management*, *supra*, at 70-75.

[15] R. Daniel Smith & Charles V. Klimas, *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin,*

cumstances, a wetland may substantially benefit adjacent waters by *minimizing* harmful water flow.

4. The Corps And EPA Have Permissibly Adopted A Classwide, Categorical Approach In Defining The Categories Of Waters Encompassed By The CWA

The validity of the Corps' approach does not depend on the proposition that wetlands separated by a berm or similar feature from a covered tributary (or other water) will *always* function as integral parts of a larger aquatic system, such that pollution of the wetlands will *necessarily* impair the quality of the adjacent waters. The consequence of treating particular wetlands as part of "the waters of the United States" is not to impose an absolute prohibition on pollutant discharges into such wetlands. Rather, inclusion of such wetlands within the jurisdictional definition simply means that the permitting agency will scrutinize and attempt to mitigate the likely impacts of a proposed discharge on the public interest (including the protection of traditional navigable waters) before deciding whether the project may go forward.

While not addressing the specific issue of berms or similar features, the Court in *Riverside Bayview* recognized that the Corps' treatment of adjacent wetlands as part of "the waters of the United States" is not rendered unreasonable or unlawful simply because *some* such wetlands will have insubstantial functional connections with the larger aquatic environment. The Court explained:

Lower Mississippi River Alluvial Valley 14-67 (2005) <http://el.erdc.usace.army.mil/wetlands/pdfs/trel02-4.pdf>; San Francisco Bay Area Wetlands Ecosystem Goals Project, *Baylands Ecosystem Habitat Goals* 1, 31, 81-83 (1999) <http://www.abag.ca.gov/ bayarea/sfep/reports.htmlCalif>.

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9.

While the presence of a berm between a wetland and an adjacent body of water may make it marginally less likely that the wetland and waterway will be significantly intertwined, the basic regulatory approach adopted by the Corps and EPA and upheld in *Riverside Bayview* still makes sense in this context. So long as the Corps and EPA have reasonably concluded that such features *generally* do not obviate the concerns at which the CWA is directed, there is no basis for setting aside the expert agencies' determination—reflected in published regulations adopted after formal notice-and-comment rulemaking—that wetlands separated by such features from other covered waters should be treated as "adjacent wetlands."

Nothing in *SWANCC* casts doubt on the commonsense proposition that the Corps and EPA may define the term "waters of the United States" to include *classes* of waters whose degradation is generally likely to cause

the sorts of environmental harm that the CWA is intended to prevent, and may consider during the permitting process whether the class-wide judgment holds true in a particular instance. In holding that the CWA does not authorize the Corps to regulate pollutant discharges into "isolated" ponds, based on the ponds' value as habitat for migratory birds, the Court in *SWANCC* explained that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in [*Riverside Bayview*]." 531 U.S. at 167. As explained above (see pp. 29-30, *supra*), however, the nexus on which the *Riverside Bayview* Court relied was the valid generalization that adjacent wetlands *as a class* will typically affect the quality of neighboring waters. The Court in *Riverside Bayview* found that nexus to be present notwithstanding the Court's express recognition that the regulatory definition of "waters of the United States" "may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." 474 U.S. at 135 n.9. The Court expressed the expectation that the Corps would deal with such unusual circumstances not by exempting particular discharges from the CWA permitting requirements, but "simply by issuing a permit." *Ibid.*

The Court in *SWANCC* disapproved the Corps' assertion of CWA regulatory authority over a class of waters (*i.e.*, isolated waters used as habitat for migratory birds) that was defined, *qua* class, wholly without reference to traditional navigable waters. See 531 U.S. at 171-172. The Court found the "Migratory Bird Rule" to be inconsistent with the CWA because the Rule gave "no effect whatever" to Congress's use of the word "navigable." *Id.* at 172. The Court in *SWANCC*, however, did not question the authority of the Corps and EPA, in

identifying "the waters of the United States" for which pollutant discharges are subject to the CWA permitting requirements, to rely on reasonable categorical judgments about the classes of waters that bear a sufficient relationship to traditional navigable waters so as to warrant coverage under the Act. And, more specifically, the Court in *SWANCC* did not question the Court's unanimous decision in *Riverside Bayview* that the agencies' judgment about the class of adjacent wetlands covered by the Act is reasonable.

5. Proof Of A Hydrologic Connection Between Wetlands And Adjacent Waters Is Not A Prerequisite To The Exercise Of Regulatory Authority Under The CWA

For the foregoing reasons, proof of a hydrologic connection to an adjacent water body is not a prerequisite to the Corps' exercise of regulatory jurisdiction over pollutant discharges into wetlands. The demonstrated absence of any significant interrelationship with adjacent waters, however, would be highly relevant to the Corps' disposition of any permit application for the discharge. Proof that no such relationship exists would likely lead the Corps to conclude that the wetland is "not significantly intertwined with the ecosystem of adjacent waterways" and is therefore "lacking in importance to the aquatic environment." *Riverside Bayview*, 474 U.S. at 135 n.9.[16] And if the Corps' analysis indicated that the

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[16] Denial of a permit in the absence of a hydrologic connection to adjacent waters might be appropriate if a particular wetland lacked hydrologic connections with adjacent waters only because individuals had previously taken unauthorized steps to sever any such connection in an attempt to render the CWA inapplicable, see pp. 35-36 & note 23, *infra*; or if the wetland nonetheless played a significant role in preserving water quality by, for example, restraining flood waters that would otherwise flow into adjacent tributaries.

proposed discharge would have no deleterious effect on the quality of adjacent waters, its ordinary course of action would be to grant the requested permit, typically with only minimal conditions.[17]

Thus, consistent with *Riverside Bayview*, the Corps and EPA have adopted a regulatory framework under which neither the presence of a berm nor the absence of a proven hydrologic connection between wetlands and adjacent waters forecloses the agencies from asserting regulatory jurisdiction, but evidence confirming or disproving the existence of a significant interrelationship with adjacent waters is carefully considered within the permitting process. That approach provides clear guidance to regulated parties and ensures that the threshold jurisdictional question can be resolved in an expeditious manner. Although the expert view of the Corps and EPA is that covered waters and their adjacent wetlands virtually always have some sort of hydrologic connection, verifying the existence of such a connection is not always an easy endeavor.[18] Surface connections can be irregular, while subsurface hydrological connections can

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[17] The regulations governing the permit application process indicate that the Corps engages in a "general balancing process" that considers "the full public interest." 33 C.F.R. 320.1(a)(1), 320.4(a); see also 33 U.S.C. 1344(b)(1) (requiring the Corps to follow additional EPA guidelines); 40 C.F.R. pts. 230-233. The character of a wetland's hydrologic connection with adjacent waters and the effects of the proposed discharge on those waters are significant factors in that "public interest" review. See, *e.g.*, 33 C.F.R. 320.4(d) (emphasizing importance of water quality concerns); (*l*) (floodplain management), (o) (navigation).

[18] See, *e.g.*, Lewis M. Cowardin et al., *Classification of Wetlands and Deepwater Habitats of the United States* 21 (1979) (technical data describing hydrologic characteristics of water regimes, including wetlands, are seldom available).

be slow, hard to detect, and difficult to document.[19] Requiring the Corps to establish the existence of such a connection in every case at the jurisdictional threshold would be administratively impracticable and, in light of the scientific evidence documenting the general interrelationship between wetlands and adjacent waters, wholly unnecessary.[20]

With respect to the distinct questions raised by wetlands separated from adjacent waters by berms and similar features, the physical characteristics of such features, and their practical effect on the aquatic environment, will vary widely from case to case.[21] It would be difficult for the Corps and EPA to articulate a succinct regulatory test for distinguishing between features that are and are not likely to sever the practical connections between wetlands and adjacent waters. The regulatory

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[19] See, *e.g.*, Mark M. Brinson et al., *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 62-64 (1995) <http://el.erdc.usace.army.mil/wetlands/pdfs/wrpde11.pdf>; *Environmental Hydrology* 268-270 (1995) (Andy D. Ward & William J. Elliot eds. 1995).

[20] The Corps typically authorizes more than 80,000 projects annually under all its permitting programs, see, *e.g.*, U.S. Army Corps of Engineers, *Regulatory Program: All Permit Decisions, FY 2003* (visited Jan. 11, 2006) <http://www.usace.army. mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf>, and informs us that approximately three-quarters of those authorizations are under Section 404.

[21] Unlike (for example) the levees lining significant stretches of the Mississippi River, the berm on petitioners' property was not engineered through a formal construction process but rather is the result of spoils sidecast during excavation of the ditch more than 50 years ago. See Pet. App. 62a. The berm is simply a low pile of dirt with drainage cuts running across it. There is no evidence that it was created for the purpose of blocking water, let alone that it is perfectly effective in achieving that result.

definition of "adjacent" as "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)) provides a readily administrable standard, focused on physical proximity, that gives clear guidance to the regulated community regarding the scope of the CWA. The agencies' decision to cast the *jurisdictional* net in clear terms, capturing wetlands with a potential effect on traditional navigable waters, while leaving context-specific inquiries about the practical significance of individual berms for the next step of the analysis, is an eminently reasonable regulatory choice.[22]

The agencies' definition of "adjacent wetlands" facilitates expeditious resolution of jurisdictional issues not only "before the fact"—*i.e.*, when the Corps and regulated parties seek to determine whether a proposed discharge would be covered by the CWA (see note 22, *supra*)—but also in civil or criminal enforcement actions brought *after* unpermitted discharges have occurred. See 33 U.S.C. 1311, 1319. In such proceedings, the government bears the burden of proving that a pollutant was discharged into waters covered by the CWA. If the "adjacent wetlands" included within "the waters of the United States" were limited to wetlands having a

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[22] The Corps' regulations provide a mechanism by which a party who wishes to know whether a discharge of dredged or fill material at a particular site would require a CWA permit may seek a "jurisdictional determination" from the agency. See 33 C.F.R. 320.1(a)(6), 325.9, 331.2. Such a jurisdictional determination may address whether a particular site contains wetlands and, if so, whether those wetlands are adjacent to a traditional navigable water or its tributary. In making a jurisdictional determination, however, the Corps considers *only* whether the site of the proposed discharge falls within the regulatory definition of "waters of the United States"; it does not consider the numerous other factors that would be relevant to the ultimate permitting decision.

hydrologic connection to neighboring waters, the government would be required to establish that a hydrologic connection had existed at the time of the discharge. The government's effort to satisfy that burden could be rendered substantially more difficult if the discharge itself obscured or destroyed physical evidence of the prior hydrologic connection. Cf. 42 Fed. Reg. 37,128 (1977) (noting that the Corps altered its definition of the term "wetlands" to require the presence of aquatic vegetation "under normal circumstances" because some individuals had attempted "to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation"). The regulatory definition of "adjacent wetlands" avoids that enforcement difficulty by articulating a standard (*i.e.*, whether the wetlands are or were "bordering, contiguous, or neighboring" to the covered waters) that can easily and accurately be applied even after a discharge has occurred.[23]

In the instant case, the Corps' denial of petitioners' permit application rested substantially on the agency's view that petitioners' proposed activities would impair

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[23] The regulatory definition also ensures that individuals do not perceive an incentive to attempt to sever wetlands' hydrologic connections to adjacent water bodies and downstream waters by constructing physical barriers—for instance, installing walls of sheet piling or welding covers onto culverts—in order to remove the wetlands from the coverage of the CWA. Although the construction of some such barriers might be separately prohibited by the CWA (because the construction process itself could involve the discharge of pollutants into "the waters of the United States"), the applicability of the discharge prohibition to that process could be disputed in individual cases. In any event, regardless of whether such a barrier can lawfully be constructed without a permit, the purposes of the CWA are served by discouraging individuals from taking unilateral steps to remove waters from the Act's coverage.

the quality of surrounding waters. The Corps' permit evaluation concluded that petitioners' proposed activities "would have major, long term, negative impacts on," *inter alia*, "water quality," as well as "minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and on aquatic wildlife." Pet. App. 4a. In its subsequent decision denying the permit application, the Corps stated that, "[c]umulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." *Id.* at 70a; see *id.* at 73a-74a. And in denying petitioners' administrative appeal of the earlier permit denial, the Corps referred with apparent approval to the prior agency findings that, "[b]esides the effects on wildlife habitat and water quality, * * * the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology." *Id.* at 66a.

Thus, the Corps' site-specific analysis indicates that the generalization on which the agency's definition of "adjacent wetlands" is premised—*i.e.*, that pollution of wetlands separated from other waters only by a berm or similar feature will typically affect the quality of the larger aquatic system—holds true in this case. Although petitioners argued in the courts below that the Corps' rejection of their permit application was arbitrary and capricious, they raise no such claim in this Court, but argue solely that their proposed discharges were not subject to the CWA permitting requirements to begin with. Particularly given the Corps' currently-unchallenged assessment of the likely effects of petitioners' proposed activities on the surrounding aquatic environment, there is no basis for petitioners' contention

(Br. 29) that the wetland on their property "has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*."

B. Application Of The CWA To Wetlands Separated By A Berm Or Similar Feature From Other Waters Covered By The Act Is A Permissible Exercise Of Congressional Power Under The Commerce Clause

Petitioners contend (Br. 40-46) that application of the CWA to their own proposed discharges would exceed Congress's powers under the Commerce Clause. Because that claim was neither pressed nor passed upon below, it is not properly before this Court. In any event, petitioners' constitutional challenge lacks merit.

1. In their brief in the court of appeals (at 28-31), petitioners discussed recent Commerce Clause jurisprudence in order to explain the decision in *SWANCC*, but they did not contend that application of the CWA to their proposed discharges would be unconstitutional. Nor did the court of appeals address any constitutional question. Petitioners' Commerce Clause challenge therefore is not properly preserved for review by this Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Indeed, petitioners' constitutional claim would have been untimely even if it had been asserted in the court of appeals. In the district court, petitioners' objections to the magistrate judge's report and recommendation (C.A. App. 856-863) did not include any Commerce Clause argument. Under longstanding Sixth Circuit precedent, issues not raised in a party's objections to the magistrate judge's report are generally treated as waived. See, *e.g.*, *United States* v. *Campbell*, 261 F.3d 628, 631-632 (6th Cir. 2001). In *Thomas* v. *Arn*, 474 U.S. 140 (1985), this Court upheld that waiver rule as a per-

missible exercise of the court of appeals' supervisory powers, explaining that "[t]he Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections [to the magistrate judge's report], prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing." *Id.* at 147-148. Petitioners should not be permitted to circumvent the Sixth Circuit's sound rule of judicial administration by raising in this Court a constitutional claim that was not properly advanced in *either* of the courts below.

2. As our brief in *Rapanos* explains (at 38-49), regulation of pollutant discharges into wetlands adjacent to tributaries is a permissible exercise of congressional power under the Commerce Clause. Because such discharges can have the ultimate effect of impairing the quality of traditional navigable waters downstream, application of the CWA to adjacent wetlands serves to protect the "channels" of interstate commerce. See 04-1034 U.S. Br. 39-44. In the aggregate, moreover, pollutant discharges into tributaries and their adjacent wetlands will have substantial commercial effects. See *id.* at 44-49.

The presence of a berm between petitioners' wetlands and the adjacent tributary does not meaningfully affect the constitutional analysis. The expert judgment of the Corps and EPA is that, when wetlands are "bordering, contiguous, or neighboring" to a covered water body, the wetlands and adjacent waters are likely to function as a single aquatic system, notwithstanding the existence of a berm or similar feature between them. Under established constitutional principles, that judgment should be sustained so long as it is rational. Compare, *e.g.*, *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2211 (2005) (holding that "Congress acted rationally" in declining to

adopt a medical-marijuana exception to the generally applicable federal ban on manufacture, possession, and sale); *id.* at 2213 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected."). Petitioners have offered neither argument nor scientific evidence casting doubt on the rationality of the agencies' determination that berms, dikes, and similar features generally do not sever the practical connection between wetlands and adjacent waters.

This Court in *Raich* reaffirmed that, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." 125 S. Ct. at 2209 (brackets and internal quotation marks omitted). In rejecting the as-applied constitutional challenge in that case, the Court in *Raich* attached particular significance to the fact that the plaintiffs had "ask[ed] [the Court] to excise individual applications of a concededly valid statutory scheme." *Ibid.* If federal regulation of pollutant discharges into wetlands adjacent to tributaries is otherwise valid, a holding that the CWA is unconstitutional as applied to wetlands separated from adjacent tributaries by berms or dikes would be just the sort of judicial fine-tuning that the Court in *Raich* specifically disapproved.

The Court in *Raich* also recognized that exceptions to a statutory ban may sometimes be exploited to circumvent the overall enforcement scheme, and that Congress's decision to address that danger through the adoption of a categorical rule "is entitled to a strong presumption of validity." 125 S. Ct. at 2212; see *id.* at

2213-2214. That concern is implicated here as well. A definition of "adjacent wetlands" that turned on the demonstrated presence of a hydrologic connection could encourage landowners to attempt to evade the CWA permitting requirements by altering the physical characteristics of their property. The Corps' definition, by contrast, avoids creation of such incentives and can readily be applied even after a discharge has occurred. See pp. 35-36 & note 23, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
GREER S. GOLDMAN
ELLEN J. DURKEE
TODD S. KIM
KATHERINE W. HAZARD
Attorneys

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IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
DICKINSON WRIGHT PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 • USSCINFO.COM

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INTRODUCTION

Neither Respondents nor their *Amici* have refuted Petitioners' argument that Respondent United States Army Corps of Engineers (the Corps) may not regulate hydrologically isolated, intrastate wetlands under the Clean Water Act (CWA or the Act). In *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), this Court established the dispositive principle for this case: that the CWA does not give the Corps discretionary authority to regulate any and every body of water that, in the Corps' own estimation, has some relationship, however attenuated, with the Nation's navigable waters. Rather, the statute covers only those water bodies that have a "significant nexus" with the navigable waters. *SWANCC*, 531 U.S. at 167. Both the statutory text and constitutional foundation of the CWA establish that the minimum requirement for finding a "significant nexus" is the existence of a surface or ground water connection between the water body to be regulated and the traditionally navigable waters and that a hydrologically isolated body of water, whether a pond or a wetland, cannot be regulated under the CWA.

When it provided that the CWA applied only to the Nation's "navigable waters," and when it defined "navigable waters" as the "waters of the United States," Congress employed legal terms of art denoting a hydrologic system whose outermost boundaries are the bodies of water that are physically integrated into the tributary system of the traditionally navigable waters. While the CWA gives the Corps some limited discretionary authority to determine which parts of that tributary system have a significant functional role

in protecting the physical, chemical, and biological integrity of the waters of the United States, the CWA does not give the Corps the discretion to enlarge the meaning of the term "navigable waters" to include isolated wetlands that have no connection whatsoever – much less a "significant nexus" – with traditionally navigable waters.

Beyond these statutory limits on federal authority, there are constitutional limits as well. The Commerce Clause does not authorize Congress to intrude upon the States' primary authority to regulate land and water use. This Court's recent Commerce Clause jurisprudence, especially its opinions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), make it impossible to interpret the constitutional basis of the CWA to permit federal regulation of any soggy ground that is physically proximate to a remote tributary of a navigable water. Under such an interpretation, the federal government will acquire an extraordinarily far-reaching police power over land use, eclipsing the States' traditional power and violating fundamental constitutional principles of federalism. Indeed, this principle is so clear, that Respondents are compelled to concede that, "after *SWANCC*, States alone have jurisdiction over intrastate, 'isolated' waters lacking a significant nexus to traditional navigable waters." Resp. Brief in *Rapanos* at 39 n. 19.

These limitations upon CWA jurisdiction will not impair the achievement of the statute's policy objectives. Respondents and their *Amici* concede that the overwhelming majority of wetlands in the United States have some kind of hydrological connection to the Nation's navigable waters. Moreover, Respondents and their *Amici* also concede that hydrologically

isolated wetlands have, at most, a greatly attenuated relationship to the prevention or control of pollution in the navigable waters. Given these facts, making CWA jurisdiction over wetlands depend upon a hydrological connection will not dramatically limit the reach or effectiveness of the CWA.

ARGUMENT

A. The Clean Water Act Does Not Give the Corps Discretion to Regulate Hydrologically Isolated Wetlands.

Respondents contend that the Corps has discretion to define the outer limits of federal authority under the CWA and that this Court must defer to the Corps' discretionary judgment to include hydrologically isolated wetlands within those limits. These contentions are misplaced, however, because they are not supported by the statutory text or by the fundamental principles regarding judicial deference to administrative agencies, as reiterated by this Court in *SWANCC*.

Respondents' primary argument for deference to the Corps' interpretation of the scope of the CWA is that the statutory terms "navigable waters" and "waters of the United States" are sufficiently ambiguous so that the Corps should be granted discretion in determining their precise meaning. This argument is unavailing because, as Petitioners demonstrated in their principal brief (Pet. Brief at 15-22), these terms have long been used in federal law, and they have never been interpreted to include bodies of water that are hydrologically isolated from the channels

of interstate commerce. Whatever discretion the Corps may have to determine the scope of CWA jurisdiction, it cannot include the discretion to attach a meaning to a statutory term that is contrary to the term's well-established legal meaning. *See Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (noting the principle that courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'") (quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291-92 (1965)).

In their brief in *Rapanos v. United States Army Corps of Eng'rs*, Case No. 04-1034, Respondents concede much of Petitioners' argument that the terms "navigable waters" and "waters of the United States" have never been understood to include anything more than those bodies of water with a physical connection to the navigable waters. For example, Respondents acknowledge that, according to *SWANCC*, the terms "navigable waters" and "waters of the United States" can only be defined to include waters with a "significant nexus" with the navigable waters; and Respondents acknowledge that these terms have been extended to at least some parts of the tributary system of the navigable waters. Resp. Brief in *Rapanos* at 19-22. But, in this case and in *Rapanos*, neither Respondents nor their *Amici* have identified any case where any court concluded that Congress ever used either of those terms with the intention of extending federal authority over water bodies that lacked a hydrological connection to the navigable waters. To the contrary, those terms have uniformly been understood to apply to water bodies that, at a minimum, have a surface or ground water connection to the navigable waters. *See, e.g.*,

United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423-26 (1940); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870) (holding that an intrastate water "can only be deemed a navigable water of the United States when it forms, by itself, or by its connection with other waters . . . a [continued] highway" with the channels of interstate commerce). Consequently, those terms are not ambiguous with respect to the question whether hydrologically isolated, intrastate water bodies may be subject to federal authority. There are no "gaps" in the meaning of the Clean Water Act that can be filled by the Corps' conclusion that a "navigable water" can include a purely intrastate wetland with no surface or ground water connection to the traditionally navigable waters.

Respondents also argue that Congress has acquiesced in the Corps' expansive definition of "navigable waters" through the 1977 amendments to the CWA (Respondents' Brief at 23); but this Court has already rejected an essentially identical argument advanced by the Corps in *SWANCC*. There, in attempting to vindicate the "Migratory Bird Rule," the Corps argued that the 1977 amendments reflected Congress' approval of the Corps' understanding of the scope of its own authority, especially because Congress rejected proposed legislation that would have restricted CWA jurisdiction. *SWANCC*, 531 U.S. at 169-70. Indeed, the Corps argued in *SWANCC* that Congress' tacit approval applied to both the Migratory Bird Rule itself, and to the Corps' other regulations that extended the scope of CWA jurisdiction, including the regulations relating to adjacent wetlands. *See id.* Nevertheless, after noting the general judicial reluctance to draw conclusions about congressional intent from congressional inaction, this Court

specifically concluded that these arguments by the Corps "failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence *to the Corps' regulations* or the 'Migratory Bird Rule' . . . ." *SWANCC*, 531 U.S. at 170 (emphasis added). Moreover, this Court went further:

> Beyond Congress' desire to regulate wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

SWANCC, 531 U.S. at 170-71. Thus, the Corps' renewed arguments regarding congressional acquiescence are no more availing now than they were in *SWANCC*.

Just as the Corps is incorrect in contending that Congress approved the Corps' attempt to regulate hydrologically isolated, intrastate wetlands, it is also incorrect in maintaining that this Court has conferred such approval in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). As this Court pointed out in *SWANCC*, the ruling in *Riverside Bayview* was limited to the question whether the CWA gave the Corps authority to regulate wetlands that were adjacent to bodies of open water. *SWANCC*, 531 U.S. at 171-72 (noting that holding in *Riverside Bayview* was limited to the proposition that "§ 404(a) extended to nonnavigable wetlands adjacent to open waters"). Indeed, in *Riverside Bayview*, this Court specifically noted that "[w]e are not called upon to address the

question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview*, 474 U.S. at 131 n. 8. Thus, contrary to the Corps' arguments, *Riverside Bayview* does not establish that the Corps has discretion to use its regulations as an instrument for expanding the definition of "navigable waters" and "waters of the United States" to include wetlands that are hydrologically isolated from such waters.

If there is any case that provides the dispositive rule here, it is *SWANCC*, which establishes that the CWA cannot be interpreted to permit jurisdiction over any isolated, intrastate water bodies. As Petitioners have argued (Pet. Brief at 26-29), and as Respondents acknowledge, *SWANCC* holds that federal authority under the CWA extends only to those bodies of water that have a "significant nexus" with the navigable waters. *SWANCC*, 531 U.S. at 167. Moreover, *SWANCC*, through its application of *Riverside Bayview*, also holds that the concept of a "significant nexus" must be understood in light the principle that the CWA applies only to those bodies of water that are "inseparably bound up" with the navigable waters. *Id.* These holdings necessarily lead to the conclusion that a body of water – whether a pond or a wetland – cannot have a significant nexus with the navigable waters unless it has, at the very least, a surface or ground water connection with the navigable waters.

The Corps attempts to avoid this conclusion from *SWANCC* by contending that something besides a hydrological connection can satisfy *SWANCC*'s "significant nexus" requirement, and that the Corps has discretion to define these other kinds of connections. *See* Resp. Brief at 21. This contention is unavailing,

however, because it disregards this Court's conclusion in *SWANCC* that the Corps is not free to interpret the CWA so broadly that the specific term "navigable waters" is redefined to mean, in effect, "any waters." When this Court concluded in *SWANCC* that it was impermissible to "read[ ] the term 'navigable waters' out of the statute," *SWANCC*, 531 U.S. at 172, this Court established that the CWA could not apply to any body of water that could not be included in the concept of "navigable waters." Although broad, that concept is not so broad as to include bodies of water that are physically separate from the traditionally navigable waters. Consequently, the CWA does not leave it up to the Corps to determine whether some non-hydrological connection is sufficient to constitute the "significant nexus" required by *SWANCC*.

There is one more reason to deny the Corps the scope of discretion claimed by Respondents. Although Petitioners identified this reason in their principal brief, and although this reason was prominently discussed in *SWANCC*, Respondents fail to meaningfully address it here. This reason involves this Court's unwillingness to give administrative agencies the discretion to interpret statutes in a manner that would stretch the boundaries of Congress' constitutional authority. *See SWANCC*, 531 U.S. at 172-73. Unless Congress has unequivocally expressed its intention to allow an agency to determine the outer limits of congressional power, this Court will not conclude that the agency has the discretion to make such determinations. *Id.* Because Respondents' position here, as in *SWANCC*, would create a novel definition of the term "navigable waters," and because it would stretch the meaning of that term to – and beyond – its constitutional limitations, this Court

cannot simply defer to the Corps' understanding of the statute and of the scope of its own authority.

For all of these reasons, this Court should conclude that the statutory terms "navigable waters" and "waters of the United States" cannot be construed by the Corps or anyone else to include intrastate wetlands that are hydrologically isolated from the traditionally navigable waters.

B. The Commerce Clause Does Not Provide Authority for the Federal Regulation of Hydrologically Isolated Wetlands.

In the event that this Court concludes that the CWA may give the Corps authority to define "navigable waters" to include hydrologically isolated, intrastate wetlands, a constitutional question arises: does Congress have the authority under the Commerce Clause to include such wetlands within the scope of federal power? Because such an extension of federal authority would substantially erode the States' ability to exercise their traditional police power over land and water use, this question must be answered in the negative.

1. Petitioners Have Not Waived the Right to Raise Constitutional Issues Regarding the Scope of Federal Authority to Regulate Hydrologically Isolated, Intrastate Wetlands.

As an initial matter, Respondents insist that this constitutional question is not properly presented in this case because Petitioners failed to adequately raise it in

the district court and in the court of appeals. Resp. Brief at 38-39. This argument should be rejected for several reasons.

First, this argument disregards the record by overlooking the fact that, by granting the petition for a writ of certiorari, this Court has already ruled that the constitutional issue is properly presented. In their brief in opposition to the petition, Respondents argued that Petitioners had waived the right raise any constitutional issue. Resp. Brief in Opp. at 15. In granting the petition, this Court did not, of course, limit the issues presented by Petitioners in any way. Thus, this Court has already been presented with the contention that Petitioners waived the constitutional issue in this case, and this Court has not acted upon it.

In any event, Respondents' waiver argument fails because Petitioners specifically addressed constitutional issues in both the district court and the court of appeals. In both courts, Petitioners contended that the Corps' assertion of jurisdiction over hydrologically isolated, intrastate wetlands was contrary to the constitutional principles set forth in *Lopez* and *Morrison*, *supra*. Pet. Dist. Ct. Brief at ii, 15-16; Pet. Cir. Ct. Brief at 28-30. Even more fundamentally, Petitioners' lower court arguments focused upon this Court's opinion in *SWANCC*, which considered the issue of CWA jurisdiction in light of *Lopez* and *Morrison*, and which specifically discussed that issue in terms of Congress' Commerce Clause authority. *SWANCC*, 531 U.S. at 172-73. Thus, Petitioners did not, as Respondents, suggest, "sandbag" the district court by withholding constitutional arguments. Because the constitutional dimension of this case was always in the forefront of any argument and analysis, there can be no doubt that the district

judge was award of these constitutional issues when he decided to adopt the magistrate's report in its entirety, and the waiver doctrine that Respondents invoke is simply inapplicable here.

At the most essential level, Respondents' arguments about waiver are unavailing because they do not relate to the foundational question of whether constitutional issues were actually raised in this case. Instead, they ultimately relate to the form in which the constitutional issues were presented. In effect, Respondents argue that Petitioners have waived their constitutional arguments because those arguments were not presented in the district court in precisely the same manner that they are presented to this Court. But this Court has held that "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was presented below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Because constitutional issues have been presented in the lower courts, this Court may also consider those issues, notwithstanding any differences in the form of the arguments.

2. Regulating Hydrologically Isolated, Intrastate Wetlands Improperly Intrudes upon the States' Traditional Police Power to Regulate Land and Water Use.

In *Lopez* and *Morrison*, this Court reiterated the general principle that Congress' authority to regulate activities under the Commerce Clause is not unlimited. More specifically, this Court held that the Commerce

Clause does not give Congress *carte blanche* to assert authority in areas that have traditionally been the exclusive province of the States' police power. In *Lopez*, this Court rejected the attempt to permit a federal intrusion into school law, and, in *Morrison*, this Court rejected a similar attempt with respect to family law. *Lopez*, 514 U.S. at 610-11; *Morrison*, 529 U.S. at 618. In this case, the Corps' attempt to use the CWA as an instrument to regulate hydrologically isolated, intrastate wetlands constitutes the same kind of incursion into state power that was invalidated in *Lopez* and *Morrison*.

This Court has recognized that, even though it creates a comprehensive regulatory scheme, the Clean Water Act does not invalidate the traditional recognition that the States have primary authority to regulate land and water use. In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court discussed the effect of the CWA on existing state law regulating water use. It pointed to the general constitutional principle that ""the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."" *Milwaukee*, 451 U.S. at 316 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, this Court concluded that States retain substantial authority to regulate waters and wetlands, notwithstanding the reach of federal power under the CWA. *Id.* And this Court reiterated that conclusion in *SWANCC*, invalidating the Migratory Bird Rule because, among other things, it impermissibly constituted a "significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

In their brief in the *Rapanos* case, even Respondents have recognized that, notwithstanding the comprehensive nature of the Clean Water Act, the States have the primary responsibility for preventing and controlling water pollution, and that this role is the product of their traditional authority to regulate land and water use, not simply the product of the delegation of federal power through the CWA. For example, Respondents assert that

> Even when the term "waters of the United States" is understood to encompass nonnavigable tributaries and their adjacent wetlands . . . States play an important role in pollution control, both under, and independent of, the CWA. . . . Moreover, after *SWANCC*, States alone have jurisdiction over intrastate, "isolated" waters lacking a significant nexus to traditional navigable waters.

Resp. Brief in *Rapanos* at 38-39 n. 19. Even more significantly, Respondents concede that, even apart from the CWA, States have "the 'primary' role . . . in preventing and addressing water pollution." *Id.*

Given the primacy and extent of State authority, federal power must be precisely defined to avoid disturbing the constitutional allocation of power between the States and the federal government. But, as Petitioners have argued in their principal brief (Pet. Brief at 40-46), these federalist principles will be undermined if the Corps may assert jurisdiction over any wetland that is physically proximate to a tributary of a traditionally navigable water, regardless of whether it is hydrologically connected to the navigable water itself. Such an extension of the CWA would

make federal anti-pollution policy the primary source of regulation for these isolated waters, displacing state law, which has traditionally been the primary source of authority over such bodies of water. As in *Lopez*, where this Court held that the Commerce Clause did not permit federal gun-control policy to displace the States' authority to make school law, and as in *Morrison*, where this Court held that the Commerce Clause did not permit federal civil rights policies to displace the States' authority to make family law, this Court should rule here that the Commerce Clause does not authorize Congress to displace the States' primary role in regulating and water use.

Contrary to Respondents' arguments, this Court's recent opinion in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) is inapposite here because it does not relate to this particular principle of federalism. In *Raich*, this Court considered the constitutionality of a federal statutory scheme regulating the manufacture, distribution and sale of drugs, and it focused on the question whether small-scale, intrastate drug use and manufacture could be excluded from the national market. There was no suggestion in that case that Congress lacked authority to regulate the national market or that the federal statutory scheme, in whole or in part, intruded upon the States' ability to exercise authority in an area of law traditionally reserved for their exclusive control. In short, *Raich* did not implicate the same principles of federalism that are at issue here and that were at issue in *Lopez* and *Morrison*, and it does not help Respondents demonstrate why the CWA should be interpreted to impinge upon the States' ability to be the primary regulators of land and water use within their borders.

C. The Achievement of the Clean Water Act's Policy Objectives Does Not Require the Regulation of Hydrologically Isolated Wetlands.

Respondents argue that deleterious consequences will follow if federal authority under the CWA is not extended to hydrologically isolated wetlands. Specifically, the Corps insists that the achievement of the CWA's comprehensive policy objectives depends upon giving maximum discretion to the Corps to identify the kinds of connections – hydrological or otherwise – that will constitute the necessary "significant nexus" with traditionally navigable waters. Petitioners have already shown why conferring such discretion upon the Corps is unwarranted in both statutory and constitutional terms; but it is unwarranted in terms of policy considerations as well. The CWA can still effectively protect the biological, chemical and physical integrity of the Nation's navigable waters if its scope is limited to water bodies, including wetlands, that, at a minimum, are literally bound up with the navigable waters.

Respondents place great emphasis on the fact that Congress intended the CWA to be a comprehensive remedial statute, designed to prevent and control water pollution throughout the Nation. Although there is no dispute that Congress intended the CWA to have a comprehensive character, the comprehensiveness of federal authority under the statute does not depend upon subjecting any and every water body or wetland in the United States to CWA jurisdiction. In specifically discussing comprehensiveness of the CWA, this Court has stopped short of holding that its reach is unlimited, noting that

"the Act applies to . . . *virtually all* bodies of water." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added). Even more importantly, of course, this Court's decision in *SWANCC* identified a category of waters that could not, in any event, be included within CWA jurisdiction – hydrologically isolated, intrastate ponds. *SWANCC*, 531 U.S. at 167. Excluding similarly isolated wetlands from federal authority under the CWA will not restrict the statute's comprehensive character any more than this Court's decision in *SWANCC* did.

Respondents also argue that the Corps' ability to effectively administer the CWA will be undermined if it is required to determine the existence of a hydrological connection before exercising jurisdiction. This argument is unpersuasive for two principal reasons.

First, requiring a hydrological connection as the minimal jurisdictional prerequisite will not, as Respondents suggest, meaningfully increase the Corps' administrative burden or make such administration unmanageable. As the Corps acknowledges (Resp. Brief at 32), and as this Court requires, *Riverside Bayview*, 474 U.S. at 135 n. 9, the Corps must always evaluate the nature and significance of the connection between a wetland and the navigable waters. Requiring the Corps to make this determination at the outset of the administrative process and as a prerequisite to the assertion of jurisdiction does not, therefore, affect the substance of what the Corps must do; it only changes the stage at which it must be done and assures that the Corps' findings on this point will be subject to more searching judicial review.

Judicial review is especially important given the prevalent tendency to assume that every wetland has a hydrological connection to the navigable waters. If the

Corps is allowed to have virtually unfettered discretion to determine the scope of its jurisdiction, it could assert jurisdiction purely on the basis of the assumption that a wetland is hydrologically connected to a navigable water. *See* Brief of Western Organization of Resource Councils, et al., at 16 ("the Corps should not be required to expend extensive resources scientifically affirming a connectivity on a case-by-case basis that is a generally accepted scientific fact"). The grant of such authority to the Corps would, in many cases, deprive persons of their property rights without a meaningful factual inquiry and without meaningful judicial review. In this case, the Corps based its initial assessment of jurisdiction upon just such an assumption, which turned out to be flatly wrong. *See* J.A. 92a. Although the Clean Water Act creates extensive federal power in the name of preventing water pollution, it cannot be understood to create power such as this.

Second, turning the existence of a hydrological connection into a question of jurisdictional fact does not, as Respondents contend, present an unnecessarily difficult factual burden. As Respondents and their *Amici* point out, most wetlands have a significant surface or ground water connection with a tributary of a navigable water. *See, e. g.*, Resp. Brief at 25-29; Brief of Western Organization of Resource Councils, et al., at 13-16. One *Amicus* has noted that such connections are so prevalent that scientists routinely presume their existence as a matter of course. Brief of Western Organization of Resource Councils, et al., at 16. Moreover, such connections can be readily determined from soil analysis and even from aerial photography. *See United States v. Rapanos*, 376 U.S. 629, 644 (6th Cir. 2004) (noting than a government expert relied upon soil analysis and aerial photography to identify wetlands

and their hydrological connections). These wetland characteristics can be evident even if the wetland has been partially or substantially filled. In *Rapanos*, the land owner engaged in extensive filling without a permit, but the Corps was still able to identify wetlands and their connections. *See id.* Given these facts, it is hard to imagine how the Corps will be unduly burdened by the minimal requirement of finding a hydrological connection between a wetland and a navigable water before it asserts jurisdiction.

D. There Is No Dispute in the Administrative Record That the Wetland on Petitioners' Property Is Hydrologically Isolated.

As they have at earlier stages in this case, Respondents maintain that this case does not really raise any issues regarding federal jurisdiction over hydrologically isolated wetlands because the wetland on Petitioners' property is not, in fact, hydrologically isolated. As Petitioners demonstrated in their principal brief, this contention is flatly contradicted by the record.

Respondents assert that the wetland here is hydrologically connected to the tributary system of Lake St. Clair because water may overtop the berm separating the wetland from the adjacent drainage ditch. Of course, as Petitioners have pointed out, this is a purely hypothetical connection, and nowhere in the administrative record did the Corps ever find that such a connection actually existed. In fact, to the contrary, the Corps repeatedly concluded that the wetland was not a part of the Lake St. Clair watershed and that waters from the wetland did not flow into any

tributaries of Lake St. Clair. *See* J.A. 106a ("berms and other features . . . presently isolate the wetland from the S-O Drain and receiving water."); *see also* J.A. 36a-37a, 40a, 82a-83a, 99a-100a, 185a.

Respondents also insist that Petitioners' property serves a hydrological function, which is essential to the CWA's purposes, because it can store storm-water runoff, thereby facilitating the control of flooding in the Lake St. Clair tributary system. Here again, however, Respondents have identified a purely theoretical characteristic of the wetland, not an actual one. The administrative record reveals that the wetland does not receive any runoff from any other property; a drainage ditch along both sides of the adjacent road prevents water from running on to the wetland from the west, and a retention pond on the property to the north prevents any water from entering the wetland from that direction. J.A. 36a. Consequently, notwithstanding Respondents' suppositions, the wetland cannot possibly serve any flood control function.

Because it does not receive water from any part of the Lake St. Clair watershed, and because it does not send water to any part of that watershed, the wetland on Petitioners' property is, in every respect, hydrologically isolated. Allowing the Corps to regulate this wetland will not serve any function in the prevention and control of water pollution anywhere.

CONCLUSION

In *SWANCC*, this Court considered the scope of federal authority under the Clean Water Act, and it concluded that such authority was limited so that the

Corps did not have discretion to define hydrologically isolated ponds as "navigable waters" or "waters of the United States." This conclusion did not depend upon any unique factual characteristics about ponds, as distinct from other water bodies or wetlands; and this conclusion was derived from a general analysis of the Act's scope, not from a narrowly focused consideration of the challenged regulation. Consequently, the principle established by this conclusion should be applied to intrastate wetlands that are hydrologically isolated, as with the ponds at issue in *SWANCC*. This Court should apply this principle to reverse the judgment of the court of appeals and to rule that the Clean Water Act does not apply to hydrologically isolated, intrastate wetlands.

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Respectfully Submitted,
TIMOTHY A. STOEPKER
Counsel of Record
DENNIS W. ARCHER
PAUL R. BERNARD
Dickinson Wright PLLC
500 Woodward Avenue,
Suite 4000
Detroit, MI 48226-3425
Telephone: (313) 223-3500
Facsimile: (313) 223-3598
Attorneys for Petitioners

Nos. 04-1034, 04-1384

In The
Supreme Court of the United States

JOHN A. RAPANOS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICI CURIAE BRIEF OF STATES OF ALASKA and UTAH, WESTERN URBAN WATER COALITION, NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, STATE WATER CONTRACTORS, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, WESTLANDS WATER DISTRICT, SAN DIEGO COUNTY WATER AUTHORITY AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

DAVID W. MÁRQUEZ
Attorney General
RUTH HAMILTON HEESE
JOHN T. BAKER
Assistant Attorneys General
State of Alaska
DEPARTMENT OF LAW
P. O. Box 110300
Juneau, AK 99811
(907) 465-3600
Attorneys for Amicus State of Alaska

RODERICK E. WALSTON
(*Counsel of Record*)
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
(925) 977-3304
Fax: (925) 977-1870
Attorney for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MARK SHURTLEFF
Attoney General
State of Utah
State Capital, Room 236
Salt Lake City, UT 84114
(801) 538-9600
Attorney for Amicus State of Utah

GUY R. MARTIN
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011
(202) 434-1650
Attorney for Amicus Western Urban Water Coalition

NORMAN M. SEMANKO
NATIONAL WATER RESOURCES ASSOCIATION
3800 North Fairfax Drive, Suite # 4
Arlington, VA 22203
(703) 524-1544
Attorney for Amicus National Water Resources Association

ROBERT MADDOW
BOLD, POLISNER, MADDOW, NELSON & JUDSON LLP
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596
(925) 933-7777
Attorney for Amicus Association of California Water Agencies

DOUGLAS K. MILLER
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
P. O. Box 43020
Phoenix, AZ 85080
(623) 869-2333
Attorney for Amicus Central Arizona Water Conservation District

JEFFREY KIGHTLINGER
General Counsel
METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
700 North Alameda Street
Los Angeles, CA 90012
(213) 217-6115
Attorney for Amicus Metropolitan Water District of Southern California

THOMAS W. BIRMINGHAM
General Manager/General Counsel
WESTLANDS WATER DISTRICT
3130 North Fresno Street
Fresno, CA 93703-6056
(559) 224-1523
Attorney for Amicus Westlands Water District

DANIEL S. HENTSCHKE
SAN DIEGO COUNTY WATER AUTHORITY
4677 Overland Avenue
San Diego, CA 92123
(858) 522-6791
Attorney for Amicus San Diego County Water Authority

BRENDA JAHNS SOUTHWICK
RONDA AZEVEDO LUCAS
CALIFORNIA FARM BUREAU FEDERATION
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5665
Attorney for Amicus California Farm Bureau Federation

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are the states of Alaska and Utah; public water agencies that are responsible for developing urban and agricultural water supplies; and a state farm bureau that represents farmers who depend on such supplies.

Amici states of Alaska and Utah are responsible for regulating all water resources, including wetlands, within their respective jurisdictions on behalf of the public, and represent the interests of their citizens in the regulation of such resources.

Amicus State of Alaska manages the largest geographic area of any state in the nation. Alaska has nearly 34,000 miles of shoreline, over three million lakes, and over 15,000 anadromous fish streams. In addition, the State of Alaska has over 174 million acres of wetlands, which are more wetlands than in all other states combined. Accordingly, almost any public infrastructure development, such as water and sewer, roads, or airport projects – as well as private development projects – involve wetlands or, in many instances, non-navigable waters.

The other *amici* are as follows:

- The Western Urban Water Coalition (WUWC) is a national coalition of municipal water agencies that serve most of the largest cities in the western United States. WUWC members serve over 31 million urban water consumers in Arizona, California, Colorado, Nevada, Utah and Washington.

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[1] The states of Alaska and Utah are not required to obtain consent for the filing of this *amici* brief (Rule 37.4). The parties have consented to the filing of this brief by the other *amici* (Rule 37.3). This brief was not written in whole or part by the parties' counsel, and no one other than *amici* made a monetary contribution to its preparation (Rule 37.6).

- The National Water Resources Association (NWRA) is a federation of state water resources associations and individuals advocating federal policy, legislation and regulations that promote the protection, sound management and beneficial use of the nation's water resources, and is the oldest national association concerned with resources policy and development.
- The Association of California Water Agencies (ACWA) represents approximately 90% of the public water agencies in California, which develop and distribute water supplies for urban and agricultural use.
- The Central Arizona Water Conservation District (CAWCD) is the largest provider of renewable water supplies in Arizona. CAWCD operates a federal reclamation project, the Central Arizona Project, which delivers about 1.5 million acre-feet of water each year from Arizona's share of Colorado River water for municipal, industrial, agricultural and Native American water uses in Arizona.
- The State Water Contractors (SWC) represents 27 public water agencies in California that have contracted for water deliveries from the State Water Project, one of the nation's largest reclamation projects. The SWC members provide agricultural water supplies for more than one million acres of land, and municipal water supplies to about 23 million people, approximately two-thirds the population of California.
- The Metropolitan Water District of Southern California (MWD) is the nation's largest urban water district. MWD is a consortium of 26 cities and water districts located in all or part of six counties in southern California.

MWD provides water on a wholesale basis to water districts that distribute water to customers in their service areas, which include about 18 million people.

- The Westlands Water District (WWD), located in Fresno and King Counties, California, is the nation's largest agricultural water district in terms of irrigated acreage. WWD provides irrigation water and drainage service to the farmers located within its district, and also provides municipal and industrial water to local residents and entities.
- The San Diego County Water Authority (SDCWA) is the wholesale water supplier to its 23 member public agencies in San Diego County, California, and provides approximately 80-90% of the urban and agricultural water consumed annually in the county.
- The California Farm Bureau Federation (CFBF) is California's largest farm organization, with over 88,000 members in 53 county Farm Bureaus, and is charged with protecting and improving the ability of farmers and ranchers to provide reliable food and fiber supplies. CFBF members contribute the majority of agricultural production in California, the marketing of which reached $31.8 billion in 2004.

Although the *amici* represent many different governmental and non-governmental organizations, they have a mutual interest in proper interpretation of federal jurisdiction under the Clean Water Act. Pursuant to this Court's decisions and under federal law, *amici* states of Alaska and Utah have the primary right and responsibility for managing and protecting their lands and water. The *amici* public water agencies and farm bureau have acquired water rights under state or federal laws, or represent agencies, groups or individuals who have acquired such rights, or have

contracted with entities who have acquired such rights. These water rights in some instances authorize large water diversions from major navigable waterways, and in other cases authorize diversions from small, local, non-navigable waterways. The *amici* believe that state and local laws are proper for regulating non-navigable waters, like many wetlands, that do not significantly affect navigable waterways. The Army Corps of Engineers, in administering its section 404 permit program, has assumed jurisdiction over all non-navigable waters that have any hydrologic connection to navigable waters, regardless of whether such waters have any significant effect on interstate commerce in navigable waters. The Corps' exercise of such jurisdiction effectively limits the traditional authority of state and local governments to regulate water use and land use, unlawfully encroaches on the states' sovereign rights, and potentially impairs the rights of those, like many *amici* here, who rely on state and local laws for their water supplies. In the *amici*'s views, the Clean Water Act does not authorize federal jurisdiction over non-navigable waters that do not significantly affect interstate commerce in navigable waters, such as the wetlands here.

SUMMARY OF ARGUMENT

These cases raise the question whether federal jurisdiction under the Clean Water Act (CWA) applies to non-navigable waters, including wetlands, that are not directly adjacent to navigable waters. The CWA authorizes federal jurisdiction over "navigable waters," defined as "waters of the United States." In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (*"SWANCC"*), 531 U.S. 159 (2001), this Court held that these definitional terms include navigable waters, and also non-navigable waters that have a "significant nexus" to navigable waters; therefore, they do not include "isolated" wetlands that are not "adjacent" to navigable waters and have no connection

to them. *SWANCC* held that Congress intended only to assert the federal government's "traditional jurisdiction" over navigable waters, or waters that could be made navigable. 531 U.S. at 172. Under *SWANCC*, the CWA does not apply to non-navigable waters, including wetlands, that are connected remotely but not directly to navigable waters, because such waters do not have a "significant" nexus to such waters. Hence, under *SWANCC*, federal jurisdiction does not extend to the wetlands in these cases.

The history of the federal navigation power, as developed by this Court's jurisprudence, demonstrates that the CWA does not authorize federal jurisdiction over non-navigable waters that do not significantly affect interstate commerce in navigable waters. This Court has held that the federal navigation power – which derives from the commerce power – authorizes regulation not only of navigable waters, but also of non-navigable waters that significantly affect navigation or interstate commerce in navigable waterways, or at least that significantly affect their flows or conditions. The Court has not, however, expanded the federal navigation power beyond these limits, and has instead recognized the authority of state and local governments to regulate water use and land use for all other purposes.

In enacting the CWA, Congress patterned federal jurisdiction on the navigation power and thus maintained the historic balance between federal sovereign authority and state and local authority. Congress explicitly authorized federal jurisdiction over "navigable waters," and thus directly invoked the navigation power as the basis of jurisdiction. Congress defined this term more amorphously as "waters of the United States," to ensure that federal jurisdiction is not strictly limited to navigation and navigable waters *per se*, but instead extends to non-navigable waters in circumstances where the navigation power has been applied – and, as noted above, this Court has recognized that the navigation power applies to non-navigable

waters that significantly affect interstate commerce in navigable waters, or at least that significantly affect their flows or conditions. Therefore, the CWA does not authorize federal regulation of non-navigable waters, like the wetlands here, that do not significantly affect navigation or interstate commerce in, or the flows or conditions of, navigable waters. The CWA, like the navigation power itself, protects the national interest in navigable waterways while otherwise recognizing the primacy of state and local laws to regulate water and land use.

Since federal jurisdiction under the CWA is based on the navigation power, which in turn defines the federal commerce interest in navigable waters, no constitutional question arises here concerning whether Congress overstepped its bounds in authorizing federal regulation beyond the limits of the navigation and commerce power. Under the Sixth Circuit's interpretation, however, a constitutional question would arise because its decisions would extend federal jurisdiction beyond the limits of the federal navigation and commerce power. The Commerce Clause does not authorize federal regulation of non-navigable waters that do not seriously implicate navigation or commerce interests in navigable waters. Therefore, the Sixth Circuit's interpretation would render the CWA unconstitutional as applied here.

ARGUMENT

I. THIS COURT'S DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. U. S. ARMY CORPS OF ENGINEERS* INDICATES THAT THE CLEAN WATER ACT DOES NOT APPLY TO NON-NAVIGABLE WATERS, SUCH AS THE WETLANDS HERE, THAT LACK A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS.

The Clean Water Act (CWA) establishes two major permit programs in furtherance of its goal of controlling

water pollution. First, section 402 establishes the National Pollutant Discharge Elimination System (NPDES), which prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1342, 1311(a). The phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). Second, section 404 prohibits the discharge of dredged or fill materials into "navigable waters" without a permit issued by the Army Corps of Engineers ("Corps"). *Id.* at § 1344. Thus, both permit programs apply to "navigable waters." The term "navigable waters" is defined as "waters of the United States." *Id.* at § 1362(7). The question presented here is whether these permit programs apply to the non-navigable wetlands in these cases. Although these cases involve the Corps' section 404 permit program, the question whether federal jurisdiction extends to non-navigable wetlands applies to the section 402 NPDES permit program as well.

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), this Court held that the Corps' section 404 program does not apply to wetlands "isolated" from – that is, having no connection to – navigable waters. Although the Court was not called on to decide the question raised here – whether the CWA applies to wetlands hydrologically-connected but not immediately adjacent to navigable waters[2] – its analysis suggests that the CWA does not apply to such wetlands. The Court held that the phrase "waters of the United States" includes both navigable waters and waters that have a "significant nexus" to navigable waters. 531 U.S. at 167. According to the Court,

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[2] Although the wetlands in *Carabell* were separated by a berm from an adjacent ditch that eventually flowed into a navigable lake, we will not address whether the berm severs the jurisdictional connection between the wetlands and the lake, and instead will assume for the sake of discussion that the wetlands were hydrologically connected to the lake.

Congress intended to assert its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172, *citing United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940). The Court noted that the Corps' original regulations, adopted two years after enactment of the CWA, limited the Corps' jurisdiction to its traditional authority to regulate navigable waters. 531 U.S. at 168; 33 C.F.R. § 209.120(d)(1). The Court rejected the Corps' argument that "waters of the United States" include all waters found anywhere in the United States regardless of their navigability, stating that Congress apparently did not intend to "exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3. "[I]t is one thing," the Court stated, "to give a word [navigable] limited effect and quite another to give it no effect whatever." *Id.* at 172.

Since *SWANCC* held that the CWA does not authorize federal regulation of "isolated" wetlands, the Court declined to reach the constitutional question whether Congress might have exceeded its commerce powers in authorizing such regulation. Nonetheless, the Court's statutory analysis was substantially driven by its constitutional concerns. The Court stated that the application of the CWA to "isolated" wetlands would result in a "significant impingement of the States' traditional and primary authority over land and water use," and that Congress presumptively would not have "significantly changed the federal-state balance" unless it "clearly" so provided. 531 U.S. at 173, 174. The Court noted that it had recently ruled in other cases that Congress' commerce power, "though broad, is not unlimited." *Id.* at 173, *citing United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). Because of these constitutional concerns, the Court declined to grant deference to the Corps' regulation under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 531 U.S. at 172.

The *SWANCC* Court distinguished its earlier decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which, the Court stated, had held that the Corps' jurisdiction under section 404 extends to wetlands that are "adjacent" to and "actually abutted" navigable waters. 531 U.S. at 167. That decision, the Court stated, does not apply where, as in *SWANCC*, the wetlands lack any "significant nexus" to navigable waters. *Id.* Thus, *SWANCC* and *Riverside Bayview*, taken together, hold that the Corps' jurisdiction under section 404 extends to wetlands that have a "significant nexus" to – that is, are "adjacent" to – navigable waters, but not wetlands lacking this nexus.

In *Rapanos*, the Sixth Circuit held that the wetlands were "waters of the United States" because there was a "hydrologic connection" between them and navigable waters, in that the wetlands eventually drained into navigable waters. Pet. App. A13-A17, A20-A29. In *Carabell*, the Sixth Circuit held that the wetlands were "waters of the United States" because there was a hydrological connection between them and a navigable lake, even though a berm separated the wetlands from a tributary that flowed into the lake. *Carabell, et al. v. Army Corps of Engineers*, 391 F.3d 704, 710 (2004).

In fact, the wetlands in these cases did not have a "significant nexus" to navigable waters because they were not adjacent to navigable waters; did not significantly affect navigation or interstate commerce in such waters; and had no apparent, significant effects on the actual flows or condition of such waters. In *Rapanos*, the wetlands intermittently drained into a manmade ditch that emptied into a non-navigable creek that eventually reached a tributary that flowed into a navigable bay, which was located a substantial distance from the wetlands. Pet. App. B9-B12. In *Carabell*, the wetlands were separated by a berm from an adjacent ditch, which emptied

into a drainage, which emptied into a creek, which emptied into a navigable lake. *Carabell*, 391 F.3d at 705-706. Thus, the connection between the wetlands and navigable waters in both cases was highly attenuated, and the distance between them substantial, and there was no "significant nexus" between them. Under *SWANCC*, the "nexus" must not only exist but must also be "significant." The nexus is not "significant" if the wetlands do not significantly affect navigation or commerce in, or the flows or condition of, navigable waters, even though there may be a bare, tenuous connection between them.[3]

SWANCC held that a "significant nexus" exists if the wetland is "adjacent" to navigable waters. 531 U.S. at 167. Thus, the test under *SWANCC* is one of proximity and contiguity, not eventual connection. The Corps' regulations define "adjacent" as "bordering, contiguous or neighboring." 33 C.F.R. § 328(c). The wetlands in these cases – although adjacent to small waterbodies that eventually connected to navigable waters – were not themselves adjacent to navigable waters. Hence, like the wetlands in *SWANCC*, they did not have a "significant nexus" to navigable waters and did not significantly affect navigation or interstate commerce.

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[3] The notion that a highly attenuated hydrologic connection to navigable waters subjects wetlands or other non-navigable waters to federal jurisdiction is particularly confounding in Alaska, since many of the wetlands or waters that may be subject to public or private development are often located many miles from a navigable water body, or the waters that emanate from them have no significant impact on the flow or condition of the navigable water body. For example, areas of Alaska, such as the North Slope and the Yukon-Kuskokwim Delta, consist of vast, wet or frozen – but arguably hydrologically-interconnected – tundra complexes spanning hundreds of miles in every direction. Under the Sixth Circuit analysis, wetlands located tens, or even hundreds, of miles from the nearest navigable water body would be subject to federal jurisdiction.

The Sixth Circuit made no inquiry into the substantiality of any nexus between the wetlands and navigable waters, in terms of whether the wetlands significantly affected interstate commerce in, or the flows or condition of, the navigable waters. Under the lower court's analysis, federal jurisdiction attaches if even a minor amount of water – a trickle – makes its way from the wetland to the navigable waters. The Sixth Circuit decisions are not consistent with *SWANCC*, which held that federal jurisdiction depends on whether a "significant nexus" exists. No such nexus exists here.

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS BASED FEDERAL JURISDICTION ON THE FEDERAL NAVIGATION POWER, WHICH AUTHORIZES REGULATION OF NON-NAVIGABLE WATERS THAT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE IN NAVIGABLE WATERS.

In enacting the CWA, Congress based federal jurisdiction on the federal government's traditional authority to regulate navigable waters, which includes authority to regulate non-navigable waters that significantly affect navigation or interstate commerce in the navigable artery. The wetlands in these cases do not fall within the scope of the traditional navigation power, and thus are beyond federal jurisdiction under the CWA.

A. The Federal Navigation Power and State Water Rights Authority

After the American Revolution, the English Crown and Parliament's sovereign control of waters – including navigable waters and underlying beds – was transferred to the original thirteen states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *United States v. Texas*, 339 U.S. 707, 717 (1950); *United States v. Oregon*,

295 U.S. 1, 14 (1935); *Shively v. Bowlby*, 142 U.S. 1, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). "[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered to the general government." *Martin*, 41 U.S. at 410. The states hold their navigable waters in trust for the public, for the protection of navigation, commerce and fisheries. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). When new states joined the Union, they were admitted on the same terms as – that is, on an "equal footing" with – the original thirteen states, and thus acquired the same sovereign control of their waters. *Corvallis*, 429 U.S. at 372-374; *Texas*, 339 U.S. at 717; *Shively*, 142 U.S. at 49-50.

When the states formed the nation, the Constitution they prepared and ratified delegated substantial powers to the federal government, including the power, contained in the Commerce Clause, art. I, § 8, cl. 3, to regulate commerce among the states. *Gibbons v. Ogden*, 22 U.S. 1, 189-190 (1824); *United States v. Lopez*, 514 U.S. 549, 552-553 (1995). The federal commerce power includes the power to regulate navigable waters in order to ensure their continued navigability; navigable waters are among the "natural highways" of interstate commerce and hence are the "public property of the nation." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899) ("highways"); *Gilman v. Philadelphia*, 70 U.S. 713, 724-725 (1866) ("public property"); *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-427 (1940). "For these purposes [of protecting navigation and navigable capacity], Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." *United States v. Chandler-Dunbar Water Power*

Co., 229 U.S. 53, 63 (1913). The federal navigation power limits the states' historic water rights authority by precluding them from granting rights that impair water navigability. *Rio Grande Dam*, 174 U.S. at 703. The federal navigation power is a "servitude" that allows the federal government to protect navigable waters without always having to pay compensation to those whose rights are impaired. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979); *United States v. Twin City Power Co.*, 350 U.S. 222 (1955); *Chandler-Dunbar*, 229 U.S. 53.

In its landmark decision in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court held that certain congressional enactments – the Desert Land Act of 1877 and the Mining Acts of 1866 and 1870 – "severed" the water on the public lands from the lands themselves; as a result of the "severance," the states regulate and control the use of water, while the federal government owns and controls the public lands. 295 U.S. at 158, 162-164. The states' control of water, however, is subject to the federal government's paramount authority to "secure the uninterrupted navigability of all navigable streams within the limits of the United States," and to regulate water "as might be necessary for the beneficial use of the government property." *Id.* at 159. Otherwise, the states have full control of all waters within their jurisdiction, including "plenary control" of all non-navigable waters. *Id.* at 163-164.

Thus, while the federal government has authority to regulate navigable waters and reserve water for use on federal lands,[4] the states possess authority under "equal

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[4] Under the Constitution's Property Clause, art. IV, § 3, cl. 2, Congress has authority to reserve water for use on federal reserved lands, and impliedly exercises this authority for the "primary" purposes of reserved lands. *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).

footing" and "severance" principles to regulate the use of water, both navigable and non-navigable, for all other purposes. *California v. United States*, 438 U.S. 645, 657-658 (1978); *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937); *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704-706 (1899). In regulating water, the states allocate water among different consumptive uses – urban, agricultural and industrial – and also allocate water for environmental purposes, such as for protection of fish and wildlife, recreation, and scenic beauty. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983); *United States v. State Water Res. Cont. Bd.*, 182 Cal.App.3d 82, 227 Cal.Rptr. 161 (1986). Although much major water development takes place because of diversions from the great navigable rivers, like the Colorado and the Columbia, much local development depends on diversions by small communities and agricultural areas from small, local waterways, like streams and canals. In *California v. United States*, written by then-Associate Justice William Rehnquist, this Court summarized the relationship between federal and state authority to regulate water:

> [E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.

438 U.S. at 662, *quoting from Rio Grande Dam*, 174 U.S. at 705.

In regulating land use, local governments often balance the need for residential and commercial development that will provide housing and promote economic growth, and the competing need to protect environmental resources, including wetlands, that may be affected by development. In balancing these needs, local governments may approve development projects because the public

benefits outweigh the environmental harm (although they may impose conditions to avoid or mitigate the harm), or instead they may disapprove the projects because the environmental costs are unacceptably high; these decisions are typically made at the local level. *See, e.g.*, California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 *et seq.*; *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (1972); *Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 173 Cal.Rptr. 602 (1981) (local government approval of development project affecting wetlands). In our federal system, state and local laws generally define property, including the right to use both land and water; the impacts of property uses on wetlands and other resources are considered by local governments in deciding whether to grant the property right or attach conditions to it. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944); *cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). This Court has recognized that regulation of land use is "'a function traditionally performed by local governments.'" *SWANCC*, 531 U.S. at 174, *quoting from Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

B. Expansion of the Federal Navigation Power

As the nation's industry expanded and its commerce developed, Congress has expanded its regulation of navigable waterways. The Rivers and Harbors Act of 1899 (RHA) prohibits any "obstruction" to the "navigable capacity of any of the waters of the United States" without congressional approval (§ 10); prohibits erection of certain structures, like dams and bridges, in any "navigable water" without Corps approval (§ 9); and prohibits the deposit of any "refuse matter" into a "navigable water" except as authorized by the Corps (§ 13). 33 U.S.C. §§ 401,

403, 407. The RHA was enacted in response to this Court's decision in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888), which had held that no federal common law bars "obstructions and nuisances" in navigable waters. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). "The true intent of the Act of Congress [RHA] was that unreasonable obstructions to navigation and navigable capacity were to be prohibited. . . ." *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929). Additionally, Congress enacted various flood control measures, such as the Flood Control Act of 1944, 58 Stat. 887 (1944), which authorize the Corps to build flood control projects to protect the navigability of the nation's waterways. The 1944 act contains a savings clause protecting the states' water rights authority; the congressional policy is "to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." *Id.* at 888.[8]

This Court has held that Congress' expansive exercise of its navigation powers is within the scope of its commerce authority, and that the navigation power is not

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[8] Acting under its navigation powers, Congress has created federal programs to develop the nation's navigable waterways for purposes unrelated to protection of navigation. The Federal Power Act of 1935, 16 U.S.C. §§ 791 *et seq.*, authorizes federal regulation of hydroelectric power development. *First-Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). The Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, authorizes federal water projects to reclaim the arid lands of the western states. *California v. United States*, 438 U.S. 645 (1978); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). This Court has upheld Congress' authority under the navigation power to adopt these water development programs, even though they are not strictly related to navigation. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (hydropower development); *Federal Power Comm'n v. Union Elec. Co.*, 381 U.S. 90 (1965) (same); *cf. Gerlach*, 339 U.S. at 742-750 (upholding reclamation program under spending power).

strictly limited to protecting navigation in navigable waters *per se*. The navigation power applies not only to actually-navigable waters, but also to waters "susceptible" of navigation, that is, capable of supporting navigation by physical improvements. *United States v. Appalachian Elec. Power. Co.*, 311 U.S. 377, 406 (1940); *The Daniel Ball*, 77 U.S. 557, 563 (1870); *see* 33 C.F.R. § 329.4 (1978). The navigation power authorizes federal regulation of navigable waters for purposes unrelated to navigation, such as for production of hydroelectric power; thus, once the waters are deemed navigable, the federal interest extends beyond navigation. *Appalachian Power*, 311 U.S. at 406-420; *United States v. Grand River Dam Auth.*, 363 U.S. 229, 232-233 (1960); *see* note 5, *supra*. The navigation power applies to all the nation's navigable waters, including those located wholly within a single state. *Utah v. United States*, 403 U.S. 9, 10 (1971). The navigation power authorizes regulation of deposits of materials, like industrial solids, into navigable waters, because such deposits impair the condition of the waters to support interstate commerce and thus are an "obstruction" to "navigable capacity." *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

More importantly here, this Court has held that the federal navigation power is not strictly confined to navigable waters, but instead extends to non-navigable waters that significantly affect navigation or interstate commerce in the navigable artery. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899); *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portion." *Atkinson*, 313 U.S. at 523. Since the purpose of the federal navigation power is to protect navigable waters that are the highways of interstate commerce, this federal power necessarily

extends to non-navigable waters that directly influence the capacity of navigable waters to bear such commerce.

In the seminal case of *Rio Grande Dam*, this Court enjoined a private party from building a dam over a non-navigable tributary of the Rio Grande in New Mexico, even though the dam was authorized under local law, because the dam threatened to "destroy" the navigability of the Rio Grande itself. 174 U.S. at 706, 707, 708. According to the Court, although Congress' desert land and mining laws granted broad authority to the states to administer their water rights systems, Congress did not grant authority to "destroy" the navigability of rivers by allowing obstructive structures, like navigation-destroying dams, to be placed in the tributaries. *Id.* at 704-705. As the Court noted, the Rivers and Harbors Act of 1890, 26 Stat. 454, the predecessor of the RHA of 1899, prohibited structures that impaired the navigable capacity of the nation's navigable waterways. *Id.* at 707. The Court stated:

> Although this power of changing the common law rule [of riparian rights] as to streams within its dominion, undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

Id. at 703.

In *Atkinson*, this Court rejected an attempt by the Governor of Oklahoma to enjoin construction of a federal flood control project on the Red River in Oklahoma, which was a non-navigable tributary of the Mississippi River.

The Court stated that the federal project was part of a "comprehensive flood-control program for the Mississippi itself," and Congress has authority to create flood control projects in non-navigable waterways in order to "protect[] the nation's arteries of commerce through control of the watersheds." 313 U.S. at 525-526, 529.

In *Grand River*, this Court, following *Rio Grande Dam* and *Atkinson*, upheld Congress' authority to create a flood control project on the Grand River in Oklahoma, a non-navigable tributary of the Arkansas River. The Court stated that Congress has authority "to 'treat the watersheds as a key to flood control on navigable streams and their tributaries.'" 363 U.S. at 232, *quoting from Atkinson*, 313 U.S. at 525.

Although the Court in these cases broadened the federal navigation power to include certain non-navigable waters, the Court did not sanction a wholesale federal intrusion into the traditional authority of state and local governments to regulate water use and land use. The non-navigable waters subject to federal regulation in these cases had major impacts on navigation or interstate commerce; they were capable of supporting major flood control projects, as in *Atkinson* and *Grand River*, or their obstruction would have "destroyed" navigability in the main artery, as in *Rio Grande Dam*. In *Atkinson* and *Grand River*, the Court emphasized that Congress' authority to regulate the "watersheds" was necessary to provide for flood control and ensure navigability of the main artery. *Atkinson*, 313 U.S. at 529; *Grand River*, 363 U.S. at 232. Thus, these cases authorize federal regulation of non-navigable waters that significantly affect navigation or interstate commerce, but otherwise preserve the authority of state and local governments to regulate water, navigable and non-navigable, for all other purposes. This Court in other contexts has balanced federal and state interests in determining the scope of federal authority to regulate

water, *see United States v. New Mexico*, 438 U.S. 696 (1978) (holding that federal reserved water rights apply to "primary" reservation uses but not "secondary" uses), and the Court has done the same in the context of the federal navigation power. As this Court stated in *California Oregon Power*, the states have "plenary control" of non-navigable waters except where significant federal navigation issues arise. 295 U.S. at 163-164. Therefore, the federal navigation power, as developed by this Court's jurisprudence, does not extend to intrastate, non-navigable bodies of water that do not significantly affect navigation or commerce interests, such as the wetlands here.

C. Enactment of Clean Water Act

In enacting the CWA in 1972, Congress was fully aware of this Court's decisions defining the federal navigation power, and based federal jurisdiction under the CWA on the navigation power. Under the CWA, federal jurisdiction for the section 402 NPDES program and the Corps' section 404 program applies to "navigable waters." 33 U.S.C. §§ 1344, 1362(12). Thus, the CWA directly invokes the navigation power as the basis for federal jurisdiction under both programs. The term "navigable waters" is defined as "waters of the United States." *Id.* at § 1362(7). The latter phrase, although undefined and somewhat amorphous, extends federal jurisdiction to the limits of the navigation power as defined in this Court's decisions – and, as noted above, this Court has extended the navigation power to non-navigable waters that significantly affect navigation or interstate commerce in navigable waters. *See, e.g., Rio Grande Dam*, 174 U.S. 690. Thus, the anchor of federal jurisdiction under the CWA is the navigation power, albeit broadly defined. The CWA's jurisdictional provisions cannot be read in isolation, devoid of the larger history surrounding the navigation power. Under

this construction, federal jurisdiction under the CWA applies, first, to navigable waters, and, second, to non-navigable waters that significantly affect the navigable artery, such as by affecting navigation or interstate commerce in the artery, or by significantly affecting its flows or condition.

Notably, the CWA's broader jurisdictional phrase – "waters of the United States" – does not provide a separate, independent basis of federal jurisdiction, but instead defines the more limited term – "navigable waters" – that establishes the basis of federal jurisdiction. Thus, "waters of the United States" does not, and cannot, fundamentally change the meaning of the term it defines, "navigable waters." "[I]t is one thing to give a word [navigable] limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172.

If Congress had intended to expand federal jurisdiction beyond the traditional limits of the navigation power, Congress presumably would have expressed its intent with unmistakable clarity, because that would have caused a major rearrangement of the traditional balance of federal and state power. The CWA evinces no clear congressional intent to rearrange the federal-state balance. On the contrary, the CWA, by grounding federal jurisdiction on the navigation power, maintains the traditional balance between federal navigation authority and state and local authority to regulate land and water use.

The legislative history of the CWA supports this analysis. According to the House Conference Committee report:

> The new and broader definition [of federal jurisdiction] is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case [citation omitted] – to include waterways which would be "susceptible of being

> used ... with reasonable improvement,".... United States v. Appalachian Electric Power Co., 331 U.S. 377, 407-410, 416 (1940) [other citations omitted.] [¶] [T]here is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." Utah v. United States, 403 U.S. 9, 11 (1971) [other citations omitted.]

HOUSE CONSIDERATION OF REPORT OF CONFERENCE COMMITTEE, *compiled in* 1 LEGISLATIVE HISTORY OF WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 250-251 (1973) (statement of Rep. Dingell). Thus, Congress intended that federal jurisdiction under the CWA would extend to the limits of the navigation power as broadly defined by this Court's recent decisions, and that federal jurisdiction would apply if the waterway serves as a "link in the chain of commerce among the States," irrespective of whether the waters are strictly "navigable," as held in *Appalachian Power*, 311 U.S. 377, or whether they are wholly intrastate, as held in *Utah v. United States*, 403 U.S. 9 (1971).

SWANCC and *Riverside Bayview* also support this analysis. *SWANCC* held that Congress intended to assert its "traditional jurisdiction" over navigable waters and its "commerce power over navigation." 531 U.S. at 172, 168 n.3. As *SWANCC* noted, the Corps' original regulations limited its jurisdiction to its traditional regulatory authority over navigable waters. 531 U.S. at 168. *SWANCC*

concluded that federal jurisdiction applies only to waters that are navigable or have a "significant nexus" to them. *Id.* at 167. In *Riverside Bayview*, the Court held that the CWA does not confine federal regulation to "navigable waters" under the "classical understanding of that term," 474 U.S. at 133, thus indicating that federal jurisdiction extends beyond strictly navigable waters to waters that fall within the navigation power. Read together, *SWANCC* and *Riverside Bayview* state the rule that the CWA authorizes federal regulation of non-navigable waters that have a "significant nexus" to navigable waters, but not non-navigable waters lacking this nexus.

The CWA contains other provisions, in addition to the "navigable waters" limitation, indicating that Congress intended to preserve the historic federal-state balance. Section 101(b) declares that the states have the "primary responsibilities and rights" to control water pollution, and to "plan the development and use . . . of land and water resources, . . . " 33 U.S.C. § 1251(b). Section 510 declares that the CWA is not to be construed as "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States," and does not preclude the states from adopting standards, limitations or requirements relating to water quality not "less stringent" than federal standards. *Id.* at § 1370. Section 401(a) provides that an applicant for a federal license or permit that would authorize a discharge into "navigable waters" must obtain a permit from the affected state that the discharge complies with the state's water quality requirements. *Id.* at § 1341(a); *see PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Perhaps more importantly, section 101(g) declares that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by" the Act. 33 U.S.C.

§ 1251(g). This provision expressly preserves the states' traditional authority to regulate water, as such authority has been recognized by this Court in *California Oregon Power, California v. United States, Nevada v. United States, Gerlach*, and other cases.[6]

The Sixth Circuit decisions below are not consistent with the limitations of federal jurisdiction under the CWA, as based on the navigation power. The decisions would expand federal jurisdiction to include non-navigable wetlands that have no significant nexus to navigable waters and no substantial relationship to navigation or interstate commerce. As the *SWANCC* Court recognized

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[6] Senator Malcolm Wallop, who sponsored section 101(g), stated in the legislative history that the provision ensures that the CWA does not abridge state water rights authority except in cases involving "incidental" effects. 123 Cong. Rec. 39212 (1977) ("the purpose of this amendment [is] to insure that State allocation systems are not subverted," but "[t]he requirements of section 402 and 404 permits may incidentally affect individual water rights," and "[i]t is not the purpose of this amendment to prohibit those incidental effects.") In *Jefferson County*, 511 U.S. 700, this Court cited Senator Wallop's statement in concluding that section 401(a) of the CWA – which, as noted above, requires that federal licenses or permits are consistent with state water quality requirements – applied in that case because its effect on state water rights laws was "incidental." 511 U.S. at 721. Since section 401(a) requires deference to state water quality laws, the provision does not overtly conflict with the objective of section 101(g), which requires deference to state water rights laws.

In *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), this Court stated that section 101(g) might exempt western water projects from compliance with CWA requirements in cases involving interbasin water transfers – although the Court did not decide the question – because such compliance might "raise the costs of water distribution prohibitively" and thus impair section 101(g)'s purpose. 541 U.S. at 108. In our view, section 101(g) was intended to preserve the states' sovereign authority to regulate water, not simply protect them from the potentially-prohibitive "costs" of compliance with CWA requirements, and therefore section 101(g)'s applicability should not depend on whether the compliance "costs" are "prohibitive."

with respect to the Corps' regulation in that case, the Sixth Circuit decisions would result in a "significant impingement" on the states' traditional authority to regulate land and water use. *SWANCC*, 531 U.S. at 173, 174. Such impingement is not permissible in the absence of a clear congressional expression, which is not found in the CWA.

III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESSIONAL REGULATION OF NON-NAVIGABLE WATERS THAT DO NOT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE.

The Constitution's Commerce Clause, art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce . . . among the several States." This Court has held that the federal commerce power authorizes congressional regulation of (1) the "channels" of interstate commerce, (2) the "instrumentalities" of interstate commerce, and (3) "activities" that "substantially affect" interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 559 (1995). The CWA regulates the "channels" of interstate commerce because it applies to "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7). The CWA is the successor of the RHA of 1899, which regulated "obstructions" and "refuse" deposits in "navigable waters" that are considered channels of interstate commerce. 33 U.S.C. §§ 403, 407; *see Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929).[7]

[7] To be sure, the CWA also regulates *activities* affecting the channels, in that it prohibits unpermitted "discharges" of pollutants into "waters of the United States." 33 U.S.C. § 1311(a). Such activities, however, are incidental to the CWA's main purpose of regulating the channels. *See id.* at § 1251(a) ("objective" of CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's

(Continued on following page)

This Court has held that Congress' authority to regulate the "channels" of interstate commerce – where the "channels" are navigable waterways – does not depend strictly on whether navigation or navigable waters are involved, but instead depends on whether the regulated activity substantially, and actually, affects interstate commerce in navigable waters. "In truth the authority of the United States is the regulation of commerce on its waters." *Appalachian Power*, 311 U.S. at 426-427. "The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are . . . best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 173-174 (1979).

Nonetheless, this Court has analyzed the federal commerce power as applied to water regulation in the context of the navigation power – that is, whether the waters are navigable, or, if they are not, whether they affect interstate commerce in navigable waters, or at least significantly affect the flows or condition of navigable waters. Thus, the constitutional focus is not on navigation or navigability *per se*, but instead on whether the regulated waters support interstate commerce or significantly affect the capacity of waters to bear such commerce. In *Appalachian Power*, this Court held that Congress has authority under its commerce powers to regulate hydropower

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waters"). Thus, the CWA's focus is on the channels of interstate commerce rather than activities affecting such commerce, unlike the federal statutes in *Morrison*, *Lopez*, and *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), which regulated various forms of conduct unrelated to interstate commerce channels.

production in navigable waters – even though hydropower production is not related to navigation – because the waters in that case were in fact navigable or "susceptible" of navigation, a factual issue the Court reviewed and decided *de novo*. 311 U.S. at 406-420. In *Rio Grande Dam, Grand River* and *Atkinson*, this Court held that the federal commerce power authorizes federal regulation of non-navigable tributaries to the extent the tributaries affect the capacity of the navigable arteries to support interstate commerce. In *California v. United States*, this Court stated that the states have "total control" over their "internal waters" except where the "navigation servitude" or reserved rights are involved, 438 U.S. at 662, which means that the federal commerce power in the context of water regulation depends on whether the navigation servitude applies, which in turn depends on whether the waters are navigable or otherwise significantly affect interstate commerce in navigable waters. In *SWANCC*, this Court stated that constitutional concerns would arise if the CWA were construed as applying to wetlands that lack a "significant nexus" to navigable waters, thus suggesting the constitutional necessity of a significant link between the regulated waters and navigable waters. 531 U.S. at 173-174.

The overarching theme of these cases is that the federal commerce power, as applied to non-navigable waters, depends on whether such waters have a *substantial* relationship with navigable waters, in that they directly affect or influence the capacity of navigable waters to support interstate commerce, or at least significantly affect the flows or condition of navigable waters – which are the same factors that apply in determining the applicability of the navigation power. "The navigation servitude . . . gives rise to an authority in the Government to assure that such [navigable] streams retain their capacity to

serve as continuous highways for the purpose of navigation in interstate commerce." *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). If, for example, someone discharges pollutants into a local pond that is connected to a navigable waterway, and the pollutants reach the navigable waterway and substantially degrade its water quality, the federal navigation power – and the commerce power on which it is based – authorize regulation of the discharge; as noted earlier, the deposit of industrial solids into navigable waters is an "obstruction" to "navigable capacity" and hence subject to federal regulation. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). If, instead, the pollutants do not cause substantial degradation of water quality in the navigable waterway, then there is no "obstruction" to "navigable capacity" and the pond has only local impacts and is subject to local regulation.[8]

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[8] In terms of the "commerce" interest necessary to sustain congressional regulation under the Commerce Clause, this Court has held that "commerce" denotes "economic" activity of an interstate nature. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 561; *see Gonzales v. Raich*, 125 S.Ct. 2195, 2211 (2005) (marijuana use on national basis involves "quintessentially economic" activities relating to the "production, distribution and consumption of commodities" for which there was an interstate market). Wetlands do not involve "economic" interests except in a highly attenuated sense, and this Court in *Lopez* and *Morrison* held that a "tenuous" and "attenuated" economic connection is not sufficient to sustain congressional commerce regulation. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 612. This Court has sometimes aggregated otherwise-local economic "activities" in sustaining congressional commerce regulation. *Raich*, 125 S.Ct. at 2207-2208, 2211; *Wickard v. Filburn*, 317 U.S. 111, 127-129 (1942). In *Lopez* and *Morrison*, however, this Court expressed its reluctance to aggregate essentially non-economic activity. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611 n.4, 613, 617. Moreover, this Court has never aggregated, as a basis for federal commerce regulation, non-navigable, local waterways that do not significantly affect interstate commerce, and that have been traditionally regulated by state and local governments. In our view, the aggregation principle should not be applied where its effect would be to substantially rearrange the federal-state balance.

In our view, this case raises no constitutional question concerning whether Congress exceeded its powers in authorizing federal jurisdiction under the CWA. As the *SWANCC* Court held, such federal jurisdiction authorizes regulation of navigable waters, and also non-navigable waters having a "significant nexus" to them. 531 U.S. at 172. Thus, the CWA provides an accommodation of federal and state authority that is consistent with, and indeed based on, this Court's interpretation of the navigation power. This is not a case, as in *Raich*, *Lopez* and *Morrison*, where Congress clearly overrode state laws and the question was whether Congress had overstepped its constitutional bounds. Here, Congress anchored federal jurisdiction on the traditional navigation power and evinced no intent to otherwise override state and local laws regulating water and land use.

The Sixth Circuit's interpretation of federal jurisdiction does raise constitutional issues, however, because its interpretation would expand such jurisdiction beyond the limits of the traditional federal navigation power – and hence beyond the limits of the commerce power. Under the Sixth Circuit's interpretation, federal jurisdiction presumably would extend to virtually every body of water in the nation – every brook and pond, every dry wash – that has any connection with navigable waters, no matter how remote the connection or how inconsequential or non-existent its effect on navigation or interstate commerce. This Court has never held or suggested that federal jurisdiction over the nation's waterways extends this far, and its navigable waters decisions clearly indicate it does not. The Sixth Circuit's expansive interpretation of federal jurisdiction would, in the words of the *SWANCC* decision, allow "federal encroachment upon a traditional state power." 531 U.S. at 174. The Commerce Clause does not allow this encroachment.

CONCLUSION

The CWA authorizes federal jurisdiction up to the limits of the navigation power but not beyond. Thus, the statute authorizes federal regulation of navigable waters, and of non-navigable waters that significantly affect navigation or commerce interests in navigable waters. The wetlands in these cases do not fall into these categories and are beyond the scope of federal regulation under the CWA. Therefore, the Sixth Circuit's decisions should be reversed.

Respectfully submitted,

DAVID W. MÁRQUEZ
Attorney General
RUTH HAMILTON HEESE
JOHN T. BAKER
Assistant Attorneys General
Attorneys for Amicus State of Alaska

RODERICK E. WALSTON
(*Counsel of Record*)
BEST BEST & KRIEGER LLP
Attorney for Amici Curiae

(42) (41)

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JOHN A. RAPANOS, ET AL.,

v.

UNITED STATES OF AMERICA,

Respondents,

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JULIE ANNA POTTS
DANIELLE ~~QUIST~~
American Farm Bureau Federation
600 Maryland Avenue, S.W.
Suite 800
Washington, D.C. 20024
(202) 406-3600

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY A. BERGER
JAMES P. GIGNAC
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

QUESTION PRESENTED

Amicus Curiae American Farm Bureau Federation will address the following question:

Whether the plain language of the Clean Water Act limits the reach of the Section 404 permitting scheme to waters that are, were, or could be made navigable in fact and wetlands that actually abut such waters.

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INTEREST OF THE AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 49 states and Puerto Rico, representing more than 5.6 million member families.[1] It has regularly participated as *amicus curiae* in this Court in cases involving the jurisdictional provisions of the Clean Water Act, including *Solid Waste Agency of Northern Cook County ("SWANCC")* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), *Borden Ranch Partnership* v. *U.S. Army Corps of Engineers*, 537 U.S. 99 (2002), *South Florida Water Management District* v. *Miccosukee Tribe*, 541 U.S. 95 (2004), and *Newdunn Associates* v. *U.S. Army Corps of Engineers*, 541 U.S. 972 (2004).

Farm Bureau farmer and rancher members produce virtually every kind of agricultural commodity raised in the United States. They own or lease land on which they depend for their livelihoods and upon which Americans rely for food, fiber, and other basic necessities. Farm Bureau's member families increasingly face multiple layers of local, state, and national regulations that impair their ability to farm that land productively, make a fair profit, and provide consumers with abundant food and fiber at fair prices.

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

The Corps' regulation of wetlands under Section 404 of the Clean Water Act ("CWA" or "Act") is one of the more serious regulatory problems that American agriculture faces today. Vast areas of the country that qualify as wetlands under the Corps' expansive definition are located on agricultural property and ranch land. Significant uncertainty exists as to whether particular wetlands fall within the geographic scope of Section 404 as "navigable waters" "of the United States"—for example, wetlands in the vicinity of farm irrigation ditches. Farmers and ranchers face uncertainty too over what activities in wetlands constitute an "addition" requiring a permit, including uncertainty concerning the scope of the agricultural exemption to Section 404. A farmer or rancher who guesses wrong and engages in some activity deemed to add fill to jurisdictional waters or wetlands faces potentially massive civil penalties and harsh criminal sanctions. See, *e.g.*, *Borden Ranch*, *supra* (affirming by an equally divided vote a $1 million civil penalty assessed against a rancher who deep-ploughed in seasonally damp areas to convert land from livestock pasture to deep-rooted tree-fruit and grape crops).

These issues should never arise for farmers and ranchers under the Clean Water Act. The plain jurisdictional language used by Congress in the Act does not reach beyond navigable waters and wetlands that are so interconnected with navigable waters as essentially to be part of them. Congress specifically reserved regulation of other waters and wetlands, like those at issue in these cases, to the States. That is the unmistakable import of the Act's operative terms, which have a long history of use and interpretation. The United States would now have this Court ignore that history in favor of an interpretation built on general statutory goals, snippets of legislative statements, and shifting agency approaches that promote the Corps of Engineers to the role of a national super-zoning board able

to halt any project in "the public interest." 33 C.F.R. § 320.4(a). Because the plain language of the statute requires it, Farm Bureau asks this Court to reverse.

FACTUAL SUMMARY

The Carabells owned property in Michigan that contained wetlands. A ditch formed one edge of the property, but a dirt berm prevented drainage of surface water from the property to the ditch. The ditch connected to other ditches and drains, which emptied into a creek, which eventually connected to Lake St. Clair, which is navigable. Carabell Pet. App. 2a-3a.

Unlike the isolated wetlands in *Carabell*, the Rapanos family's Michigan wetlands had surface water connections to other waters. Surface water from one site reached a drain, which flowed to a creek, which connected to the Kawkawlin River, which ran into the Saginaw River before emptying into Lake Huron. Approximately 20 miles separated this site from the nearest navigable water. Surface water from two other sites also reached ditches and drains that eventually connected to navigable waters. Rapanos Pet. App. A22-A23; *United States* v. *Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003).

The Carabells applied to Michigan authorities in 1987 for a permit to excavate their 20-acre property to construct residential housing. *Pet. of June and Keith Carabell*, 1998 WL 710423, at *7-8 (Mich. Dep't Natural Res. Sept. 30, 1998). After Michigan regulators denied the permit, the Carabells reapplied for a permit in 1993 with plans for a smaller development. Carabell Pet. App. 3a. During the 5-year permit process that followed, which included a full trial, the Carabells submitted revised proposals for still smaller developments that reduced the amount of wetlands involved. *Pet. of June and Keith Carabell*, 1998 WL 710423, at *8. In 1998, Michigan regulators finally

granted the Carabells a permit to fill 12 acres of wetlands, requiring them to enhance the remaining 4 wetland acres by planting "diverse plant species to improve the quality, function, and aesthetics of the wetland" and installing a detention pond. *Id.* at *9.

Then—after 11 years of state proceedings—the Corps and EPA intervened, asserting jurisdiction. The Carabells applied for a federal permit in 1998, were denied in 2000, and following a fruitless administrative appeal filed this action in federal district court in 2001, 14 years after first seeking a permit. Carabell Pet. App. 4a-6a.

The Rapanoses also had a challenging relationship with federal regulators. Between 1994 and 2003, John Rapanos defended himself in two criminal trials, was convicted, sentenced to three years' probation and fined $185,000, made four separate trips to the Sixth Circuit—where his conviction was vacated and then reinstated—and twice sought review from this Court. Rapanos Pet. App. A4-A5. In 2003, the Sixth Circuit ordered Rapanos, who is 70 years old, resentenced to 10-16 months' incarceration. *United States* v. *Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003), cert. denied, *Rapanos* v. *United States*, 124 S. Ct. 1875 (2004).

At the same time, the government pursued a civil action against the Rapanoses for allegedly filling protected wetlands. It sought $10 million in fines, $3 million in environmental mitigation fees, and the forfeiture of 80 acres of property. After a 13-day bench trial, in which the district court granted summary judgment for the Rapanoses regarding one site and concluded that the government failed to establish that wetlands even existed at two others, the district court found the Rapanoses liable for filling at three other sites. Rapanos Pet. App. B1-B2, B32-36. The Sixth Circuit affirmed. *Id.* at A1-A34.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Corps now correctly recognizes—as this Court's decision in *SWANCC* forced it to do—that the constitutional basis for the Clean Water Act is Congress's commerce power over the channels of interstate commerce, not the more expansive "affects" power. U.S. Br. in Opp. in *Rapanos*, at 23 (in contrast to cases involving "the regulation of activities that 'substantially affect' interstate commerce," this case "involves legislation falling within the first category of permissible Commerce Clause legislation * * *, regulation of the use of the channels of interstate commerce"); *SWANCC*, 531 U.S. at 168 n.3 (finding no indication that "Congress [in Section 404] intended to exert anything more than its commerce power over navigation"); *id.* at 172 ("Congress had in mind as its authority for enacting the CWA * * * its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made").

The Corps is correct that this "channels" power permits Congress, when it so chooses, to regulate beyond navigable waters to reach related locations and activities that may adversely impact the use of the navigable waters as channels for commerce. See, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions"); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *United States* v. *Lopez*, 514 U.S. 549, 558 (1995); *Pierce County* v. *Guillen*, 537 U.S. 129, 146-147 (2003).

Where the Corps is seriously mistaken is in its claim that Congress in Section 404 of the Clean Water Act chose to assert its channels power so broadly as to reach any wa-

ter or wetland with any physical connection to navigable waters, on the theory that some activities in some of those waters or wetlands might have some adverse effect on navigable waters as channels of commerce. That claim is inconsistent with the plain language of the Act, which extends jurisdiction only to navigable waters. It is inconsistent with Congress's and this Court's long history in using the operative terms of the statute more narrowly. And it is refuted by contrasting the language of the CWA with the language Congress uses in statutes in which it does intend to reach more broadly than the navigable waters.

The Corps' claim to have jurisdiction over virtually any activity on any damp patch anywhere in the Nation is squarely at odds with Congress's explicit goal in the CWA to preserve the traditional power of the States over land and water use as part of a model scheme of environmental protection by cooperative federalism. It further violates important principles embodied in the rule of lenity, which requires fair warning of what conduct constitutes a crime.

ARGUMENT

I. BY THE PLAINEST OF LANGUAGE, THE CLEAN WATER ACT LIMITS THE CORPS' SECTION 404 JURISDICTION TO WATERS THAT ARE NAVIGABLE.

The Clean Water Act prohibits "any person" from discharging "dredged or fill material" into "navigable waters" without a permit from the U.S. Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The terms "navigable waters" and "waters of the United States" do not authorize regulation of water and wetlands that merely have some connection to navigable waters.

A. "Navigable Waters" Are Waters That Are, Have Been, Or Could Be Made Navigable In Fact.

The Northwest Ordinance, art. IV (1787), provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrance * * * shall be common highways." See also *Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874). Consistent with this understanding of navigable waters as "common highways" of commerce, this Court's early cases held that the "navigable waters" are waters "which are navigable in fact," meaning "susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). That standard "applie[d] to all water courses." *Utah* v. *United States*, 403 U.S. 9, 11 (1971). Later decisions expanded the concept of "navigable waters" to include waters that had previously been used in navigation or that could be made navigable through reasonable improvements. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940); *SWANCC*, 531 U.S. at 172. That expanded definition, in requiring that water is, was, or could be made navigable in fact, does not reach non-navigable streams, ditches, culverts, or wetlands that eventually feed into navigable waters (*Rapanos*) or that are simply physically proximate to waters that eventually connect to navigable waters (*Carabell*).

B. Congress Did Not Expand The Scope Of The Act By Defining "Navigable Waters" As "Waters Of The United States."

Congress's definition of "navigable waters" as "waters of the United States," far from expanding the Act's reach, confirms that navigability is the key to the Corps' jurisdiction. The phrase "navigable waters of the United States" has long been used to mean waters over which interstate commerce may pass. *E.g.*, *Donnelly* v. *United States*, 228

U.S. 243, 262 (1913) ("what are navigable waters of the United States" depends on whether the water "affords a channel for useful commerce"); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870) (a river that "is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters * * * is not a navigable water of the United States"); accord Rivers and Harbors Act § 10, 30 Stat. 1121, 1151 (1899); *The Daniel Ball*, 77 U.S. at 563; *Leovy* v. *United States*, 177 U.S. 621, 632 (1900); *Perry* v. *Haines*, 191 U.S. 17, 28 (1903); *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U.S. 406, 411 (1909); *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 367 (1912).

When Congress used the phrase "waters of the United States" to define the term "navigable waters" it tapped into this long history, in which the two phrases are inseparable and mean the same thing. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("when a statute uses" a legal term of art "Congress intended [the term] to have its established meaning"); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) (Congress intends to "adopt the interpretation placed on that concept by the courts"); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). The "normal rule" is that Congress is understood to have changed such established meanings only if "it makes that intent specific," which it did not do in the CWA. *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

The interchangeable nature of the Act's jurisdictional terms is made abundantly clear by comparing the language of the CWA with that of the Aquatic Nuisance Prevention Act of 1990, 16 U.S.C. § 4702(16). While the CWA defines "navigable waters" as "waters of the United States," the Aquatic Nuisance Prevention Act *exactly reverses that*

definition, stating that the "waters of the United States" there "means the navigable waters and the territorial sea of the United States."

By contrast, when Congress intends to reach beyond waters that are, have been, or could be made navigable in fact, it does not use the terms "navigable waters" or "waters of the United States" by themselves. For example, in the Flood Control Act of 1936, 49 Stat. 1570, which this Court considered in *Oklahoma ex rel. Phillips*, 313 U.S. at 517-518, Congress explicitly asserted jurisdiction over "navigable waters or their tributaries, including watersheds thereof." Little wonder, given that broad statutory language, that this Court held the United States could dam non-navigable portions of the Red River to prevent Mississippi River flooding. By its reference to "tributaries" and "watersheds thereof," this Court observed, "Congress exercised all the power it possessed to control navigable waters." *Id.* at 523. See also, *e.g.*, Federal Power Act, 16 U.S.C. § 817 (asserting jurisdiction over projects on "navigable waters of the United States" *and* other waters "over which Congress has jurisdiction under its authority to regulate commerce"); *id.* § 797(e) (same); *cf. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199 (1974) (rejecting argument that "facially narrow" statutory language was intended "to manifest the full degree of [Congress's] commerce power").

No such broad terms define the Corps' jurisdiction under CWA Section 404. To the contrary, Congress rejected a Senate proposal to extend jurisdiction to "the navigable waters of the United States, portions thereof, *and the tributaries thereof*," adopting instead the historically narrower definition that appears in Section 502(7). S. 2770, 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print Compiled for the Comm. on

Public Works by the Library of Congress, Ser. No. 93-1 (1973), at 1698) ("Leg. Hist.") (emphasis added).

Accordingly, in Congress's understanding, as in more than a century of this Court's decisions, the "waters of the United States" *are* waters that are "navigable"—that "were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. They are *not* non-navigable waters and wetlands that are simply physically connected to navigable waters. When Congress means to assert jurisdiction over non-navigable tributaries and other waters within a watershed it knows well how to say so. The CWA does not reach so far, intentionally leaving regulation of such waters and wetlands to the States. See Part II.A, *infra*.[2]

C. The CWA's Legislative History Does Not Expand The Plain Meaning Of The Act's Jurisdictional Terms.

Although the government can point to snippets of legislative history that suggest a broader scope for the Act, it conceded in *SWANCC* that this history is "somewhat ambiguous." 531 U.S. at 168 n.3. Legislative history, of course—especially when it is ambiguous—cannot "cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510

[2] As this Court concluded in *SWANCC*, Congress's amendment of the CWA in 1977 did not alter the meaning of Section 404(a) or of Section 507's definitions, which this Court found "to be clear." 531 U.S. at 172. Neither Section 404(g) nor other provisions amended in 1977 "conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')." *Id.* at 171; see also *id.* at 170 ("The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing § 404(a)" is "considerably attenuated").

U.S. 135, 147-148 & nn.17-18 (1994); see *Exxon Mobil Corp.* v. *Allapattah Servs.*, 125 S. Ct. 2611, 2626 (2005) ("the authoritative statement is the statutory text, not the legislative history or other extrinsic material"). And here there is plenty of legislative history that confirms Congress's focus on navigability as the touchstone of federal jurisdiction.

Senator Muskie, for example, Senate floor manager for the conference bill, explained that the Act would reach waters "which are navigable in fact," such that "they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation * * * a continuing highway over which commerce is or may be carried." 1 Leg. Hist. at 178. House floor manager Representative Dingell likewise described the scope of the Act in terms of commercial navigability: "it is enough that the waterway serves as a link in the chain of commerce," 1 Leg. Hist. at 250, citing *Utah*, 403 U.S. at 11 ("The lake was used as a highway and that is the gist of the federal test"). In light of such statements, the assertion that the legislative history shows Congress meant to regulate far beyond the navigable waters is untenable.

D. Contemporaneous Regulatory Interpretations Correctly Determined The Scope Of The CWA.

As in *SWANCC*, "the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here." 531 U.S. at 168. Consistent with the long history of the terms "navigable waters" and "waters of the United States" in Congress and this Court, the Corps in 1974 defined "navigable waters" to mean waters subject to the ebb and flow of the tide or that "are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

The Corps explained that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* § 209.260(e)(1). This Court in *SWANCC* found "no persuasive evidence that the Corps mistook Congress' intent in 1974." 531 U.S. at 168. Indeed, the Corps' definition of "navigable waters of the United States" still reflects that view, see 33 C.F.R. §§ 329.4, .5, .6, regulating only to the point where water changes "from navigable to non-navigable." *Id.* § 329.11(b).

The Corps embarked on efforts to expand its power under Section 404 in response to a single adverse district court decision, which it did not appeal. *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975). Once untethered from the language of the statute the Corps struck out wildly, asserting jurisdiction over all waters "the use, degradation or destruction of which could affect interstate or foreign commerce" (33 C.F.R. § 328.3(a)(3))—though this Court has observed that the CWA does not rest on Congress's "affects commerce" power. That path culminated in the Corps' frankly absurd "migratory bird rule," which this Court struck down in *SWANCC*.

The Corps then switched its attention to an "any hydrological connection to navigable waters" approach (*Rapanos*), stretching so far in cases like *Carabell* as to claim power over wetlands that are merely proximate to, but not hydrologically connected with, non-navigable waters that eventually connect to navigable waters. Like the bird rule, that approach subjects virtually every wet patch in the country to federal regulation, and like the bird rule it has no basis in the CWA's language. It should suffer the same fate as the bird rule.

E. The Isolated Wetlands In *Carabell* And Wetlands That Drain To Non-Navigable Ditches In *Rapanos* Are Beyond The Scope Of Section 404.

It follows from the plain language of the statute that the Corps has no power over water simply because its "use, degradation, or destruction * * * could affect interstate commerce." Nor may it properly claim jurisdiction over any water that is merely a "tributary" of a navigable water or over "wetlands adjacent to" such tributaries. 33 C.F.R. § 328.3(a)(5), (7). Non-navigable tributaries and their adjacent wetlands are not "navigable waters" or "waters of the United States."

To be sure, this Court held in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 131, 134 (1985), that wetlands that actually abut a "navigable waterway" fall within Section 404 because they are "inseparably bound up with the 'waters' of the United States." Such wetlands may be viewed as an integral part of the navigable waters themselves. See Brief of the United States in *Riverside Bayview*, at 47 ("Riverside's property is simply part of a larger divided-ownership marsh that abuts and borders Black Creek," which is "a navigable waterway"); *cf.* 33 C.F.R. § 329.11(a) (navigable water "extend[s] laterally to the entire water surface and bed of a navigable waterbody, * * * even though portions" are "extremely shallow, or obstructed by shoals, vegetation or other barriers," as with "[m]arshlands").

The wetlands at issue here are much farther removed from the navigable waters of the United States. Those in *Carabell* are merely physically adjacent to—not even hydrologically connected to—a non-navigable ditch or drain. They are as "isolated" from navigable waters as the ponds this Court addressed in *SWANCC*. The wetlands in *Rapanos* are 20 miles removed from actually navigable wa-

ters, draining into non-navigable ditches and drains. By no stretch of the language of the CWA can these wetlands be labeled "navigable waters" "of the United States" within the Corps' Section 404 jurisdiction.

II. ESTABLISHED RULES OF STATUTORY CONSTRUCTION CONFIRM THAT THE CWA REACHES ONLY WATERS THAT ARE, HAVE BEEN, OR COULD BE MADE NAVIGABLE IN FACT.

Two bedrock canons of construction confirm this scope of Section 404. The Corps' theory that it may rest jurisdiction on a drop of wetland water eventually reaching a navigable waterway upsets the traditional State-Federal balance of power. It also subjects landowners to severe criminal and civil penalties without fair warning. Both problems require that the Act be read more narrowly.

A. The CWA Explicitly Preserves Local Power Over Land And Water Use.

There is an "'ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This Court has consistently "concluded that, absent a clear indication of Congress' intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." *Salinas* v. *United States*, 522 U.S. 52, 59 (1997); see also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984); *United States* v. *Bass*, 404 U.S. 336, 349 (1971); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the States were not to be superseded * * * unless

that was the clear and manifest purpose of Congress"). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). It is not satisfied here.

1. The Corps' "any physical connection" approach improperly overrides State and local authority that Congress sought to preserve.

The States have long controlled land and water use within their borders. *SWANCC*, 531 U.S. at 174. Regulation of land and water use "is perhaps the quintessential state activity," *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982), and "the authority of state and local governments to engage in land use planning" remains unquestioned. *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). See also *City of Edmonds* v. *Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States").

Far from clearly stating in the CWA that it intended to usurp State power by granting the Corps authority over every drop of water and tract of damp land in the Nation, Congress stated its intent to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). Congress also unequivocally stated that "[e]xcept as expressly provided," "nothing in this chapter shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370.

These provisions highlight Congress's commitment to cooperative federalism in protecting the Nation's waters.

See *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government"); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("cooperative federalism[] is replicated in numerous federal statutory schemes. These include the Clean Water Act"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987).

The Corps' new test for Section 404 jurisdiction tramples that scheme. There should be no doubt about the impact on State authority of the Corps' claim of jurisdiction based on "any hydrological connection" to navigable waters, no matter how remote or theoretical. Alaska alone has 170 million acres of wetlands. Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 VA. ENVTL. L.J. 1, 19 n.99 (2000). Florida, Louisiana, Minnesota, Texas, Michigan, Maine, Georgia, North Carolina, and Wisconsin each contain 5 million acres or more of wetlands. *Ibid.*; U.S. EPA, *Wetlands: Status and Trends*, www.epa.gov/OWOW/wetlands/vital/status.html; Natural Resources Conservation Service, *National Resources Inventory: 2002 Annual NRI* 1-2 (2002), www.nrcs.usda.gov/technical/land/nri02/wetlands.pdf (300 million acres of wetlands nationwide). Most are undoubtedly connected in some roundabout fashion to a navigable waterway.

Once the Corps has asserted jurisdiction, it claims authority to regulate every use of the land that could conceivably affect the water or wetlands. The Corps' regulations prohibit the discharge of any fill material, defined without limitation to mean "[r]eplacing any portion of a water of the United States with dry land." 33 C.F.R. § 323.2(e)(1)(i). The Corps has construed this expansive language to include "construction or expansion of a single-family home" or construction of a "garage, driveway, storage shed," or "yard." 64 Fed. Reg. 47,175, 47,178 (Aug.

30, 1999); 61 Fed. Reg. 65,874, 65,898 (Dec. 13, 1996). See also 33 C.F.R. § 323.2(f). The Corps has even claimed that walking or bicycling on a wetland could have a forbidden effect of degrading or destroying a wetland. 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). The Corps' "reassurance" that a permit is not required for de minimis wetland impacts is far from comforting: the Corps has emphasized that "the threshold of adverse effects for the de minimis exception is a very low one." *Ibid.*

And once it asserts jurisdiction, the Corps reviews state and local land use decisions in light of its view of "the public interest," engaging in a "general balancing" of factors including "economics," "aesthetics," "land use," "the needs and welfare of the people," and the "practicability of * * * alternative locations," freely rejecting "local * * * decisions" whenever it deems issues of "national importance" to be "overriding." 33 C.F.R. §§ 320.4(a)(1), (a)(2)(ii), (j)(2). The Corps operates, in short, as a sort of national zoning board, freely overthrowing local land use determinations made by those best placed to understand local needs and concerns.

2. The Corps' "any physical connection" approach is unnecessary to achieve wetlands protection.

There is no evidence that this layer of federal bureaucracy is necessary to achieve environmental goals. The mythology of state ineptitude in areas of wetlands preservation is unfounded. There has been no "race to the bottom" in terms of environmental regulation by the States. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale For Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1244-1247 (1992) (challenging the theoretical foundations of the "race to the bottom"). Nor would such a race make sense, for local governments have as

much or more to gain from a "race to the top" that results in a clean and desirable environment for its present and future residents. See Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 43 (1999); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 706 (1995). State and local governments have served as strong leaders in environmental regulation, taking seriously their "primary responsibilities * * * to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

For example, Michigan, home of the petitioners, has long been at the forefront of protecting water resources. The Michigan Constitution requires the legislature to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." MICH. CONST. art. IV, § 52. The Michigan Environmental Protection Act of 1970 (MEPA) is "considered the finest example of an environmental protection statute" and "has been copied by several state legislatures around the nation." Fred R. Jensen, *Developing the Future of Michigan Environmental Law: Expanding and Blending MEPA with the Public Trust Doctrine*, 1989 DET. C. L. REV. 65, 66, 75. MEPA contains "[s]ome of the most innovative environmental protection measures.' ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 101 (4th ed. 2003). Michigan is also one of only two states that assumed Section 404 responsibility from the federal government, having done so in 1984. 33 U.S.C. § 1344(g); 40 C.F.R. § 233.70. It has enacted several stringent laws to protect wetlands and other water resources. Inland Lakes and Streams Act of 1972, MICH. COMP. LAWS § 324.30101 *et seq.*; Goemaere-Anderson Wetlands Protection Act of 1979, MICH. COMP. LAWS § 324.30301 *et seq.*; see WILLIAM L. WANT, LAW OF

WETLANDS REGULATION § 13:18 (2005). As the Carabells' lengthy process to obtain a permit from State authorities shows, Michigan regulators are fiercely protective of the State's wetlands.

States and local governments have been at the vanguard of wetlands conservation. Massachusetts enacted its wetlands protection statute in 1963. *Comm'r of Natural Res.* v. *S. Volpe & Co., Inc.*, 206 N.E.2d 666, 668 (Mass. 1965). By 1975, 14 of the 15 States with more than 10% of their land area in wetlands had passed wetlands protection statutes. Adler, 29 ENVTL. L. at 49. Nearly every State now has some statutory or regulatory scheme governing wetlands. See *SWANCC,* Amicus Br. of State of Ala., App. A (listing state wetlands statutes and regulations). Many of these statutes are more stringent than the Clean Water Act. For instance, New York regulates not only wetlands but also any land within a hundred feet of a wetland. N.Y. COMP. CODES R. & REGS., tit. 6, § 663.2(b).

SWANCC also has served as an impetus for local environmental protection. Since 2001 several States enacted legislation or altered their regulations to cover isolated wetlands. See IND. CODE ANN. § 13-18-22; 15A N.C. ADMIN. CODE r. 2H.1300; OHIO REV. CODE ANN. § 6111.02; WIS. STAT. ANN. § 281.36. Likewise, municipal governments such as Kane County, Illinois and Escambia and Leon Counties, Florida, have taken responsibility for isolated waters in their jurisdictions. See Kane County Code of Ordinances §§ 9-90, 9-351 to 9-360; Escambia County Code of Ordinances, Pt. III, § 7.13.00; Leon County Code of Laws § 10-187.

The myth of State wetlands neglect is intertwined with the untenable proposition that the federal government knows best when it comes to wetlands. Because of the variety of wetlands in this country—from mangrove forests

in the Southeast to prairie potholes in the Plains—States possess specialized wetland management abilities that reflect their unique knowledge of their unique wetlands. Several western States distinguish between ephemeral, intermittent, and perennial waters in delineating wetlands and determining where to devote regulatory resources. ARIZ. ADMIN. CODE § R18-11-101(22), (30); MONT. ADMIN. R. 17.30.602(12), (15); UTAH ADMIN. CODE R645-100-200; 020-080-001 WYO. CODE R. § 2(b)(xiii), (xxiv), (xxxvii). Minnesota has unique laws governing calcareous fens, which are rare, calcium-rich wetlands that can contain hard-to-find plant life. MINN. STAT. § 103G.223; MINN. R. 8420.1020. Maryland has a statutory focus on Chesapeake Bay, MD. CODE ANN., ENVIR. § 5-901 *et seq.*, while Florida enacted specialized statutes governing wetlands associated with the Wekiva River System, the Miami-Dade County Lake Belt, and Lake Okeechobee. FLA. STAT. ANN. §§ 369.305, 373.41492, 373.4595. The contrast between the specificity of these State laws and the generality of the CWA and its regulations demonstrates that States are well able to regulate in light of the idiosyncrasies of their own wetlands.

States are, and have been, strong partners in the preservation of wetlands. They have taken seriously their responsibilities under the CWA's cooperative federalist vision. Their actions demonstrate that Congress chose wisely when it explicitly preserved local powers over land and water use. There is no justification for the Corps' efforts to alter the traditional federal-state balance.

3. Congress has ample power to protect non-navigable waters and wetlands when it so chooses.

A proper reading of the CWA to limit Corps authority to navigable waters and wetlands that abut them will not deprive the federal government of the ability to protect our

Nation's wetlands. Congress can and has used its spending and property powers to that end. U.S. CONST. art. 1, § 8.

Many programs operated through many agencies provide financial incentives—both penalties and benefits—to preserve and restore wetlands. Since 1985, the Wetlands Conservation Program, known as "Swampbuster," has discouraged the destruction of wetlands on agricultural property by withholding federal benefits from farmers who do not comply. 16 U.S.C. § 3821. The Wetlands Reserve Program compensates farmers for restoring, protecting, and enhancing wetlands. *Id.* § 3837. Many additional programs utilize cash payments, subsidies, grants, partnerships, or technical assistance to encourage wetlands preservation. See *id.* § 3831 (Conservation Reserve Program) (authorizes rental payments and financial assistance in exchange for retirement of wetlands from agricultural use); *id.* § 4401 *et seq.* (North American Wetlands Conservation Act) (authorizes funds to acquire, restore, and manage wetlands); *id.* § 1301 *et seq.* (Water Bank Act) (authorizes payment of federal funds to private landowners for conservation); *id.* § 1451 *et seq.* (Coastal Zone Management Act); 23 U.S.C. § 133 (Transportation Equity Act for the 21st Century); U.S. EPA, *Catalog of Federal Funding Sources*, http://cfpub.epa.gov/fedfund (listing at least 47 different federal sources of financial assistance for wetlands preservation).

Congress also protects wetlands through its federal lands power. The North American Wetlands Conservation Act requires that "[t]he head of each Federal agency responsible for acquiring, managing, or disposing of Federal lands and waters * * * cooperate with * * * the United States Fish and Wildlife Service to restore, protect, and enhance the wetland ecosystems." 16 U.S.C. § 4408. Other statutes promote wetlands preservation on federal lands.

See, *e.g.*, *id.* § 1604 (National Forest Management Act) (requiring U.S. Forest Service to protect wetlands in harvesting timber); 43 U.S.C. § 1701 *et seq.* (Federal Land Policy and Management Act) (mandating protection of wetlands by public land managers). Because approximately 13% of the Nation's wetlands are on federal lands, Congress's federal lands power provides a significant tool for wetlands protection. Council on Environmental Quality, *Conserving America's Wetlands* 17 (Apr. 2005), www.coastalamerica.gov/Conserving_Americas_Wetlands.pdf.

* * *

Accordingly, restoring the Corps' power to the boundaries set by the CWA will not unleash a wave of wetlands destruction. Active state regulation and a litany of federal programs will preserve wetlands in precisely the manner intended by Congress—as a function of cooperative federalism.

B. The Rule Of Lenity Prohibits The Corps' Assertion Of Jurisdiction Over All Waters And Wetlands With Any Physical Connection To Navigable Waters.

Though we do not believe that the CWA is at all ambiguous, if the Court were to find it so the "rule of lenity"—a rule of statutory construction "not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)—would require a narrow interpretation of the terms "navigable waters" and "waters of the United States."

1. The CWA sets forth a scheme of harsh criminal and civil penalties.

The CWA prescribes heavy and conjunctive civil and criminal sanctions. Civil and administrative penalties can equal $25,000 per day, 33 U.S.C. § 1319(d), (g). Criminally, a "knowing" violation of the CWA carries fines up to $100,000 per day and six years' imprisonment. *Id.* § 1319(c)(2). Even *negligence* can result in fines of $50,000 per day and two years' jail time. *Id.* § 1319(c)(1). The permit application process presents further peril: a false statement, representation, or certification can bring fines up to $20,000 per day and four years' imprisonment. *Id.* § 1319(c)(4).

The threat of jail time and large fines is far from abstract. John Rapanos was levied a $185,000 fine and faced 10-16 months' incarceration. Rapanos Pet. App. A4-A5. He faced this punishment, along with nearly $15 million in civil fines and forfeiture of his land, even though his wetlands are some 20 miles from the nearest navigable waterway and there was no evidence that his actions actually impaired any navigable waters. He is not alone. Criminal prosecutions for CWA violations are frequent. See, *e.g.*, *United States* v. *Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (one year in prison); *United States* v. *Phillips*, 367 F.3d 846, 854 (9th Cir. 2004) (five years' probation); *United States* v. *Wilson*, 133 F.3d 251, 253 (4th Cir. 1997) (21 months in prison, $1 million fine, eventually overturned); *United States* v. *Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997); *United States* v. *Sinskey*, 119 F.3d 712, 714 (8th Cir. 1997); *United States* v. *Hopkins*, 53 F.3d 533, 537-541 (2d Cir. 1995); *Mills* v. *United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Multiple prosecutions from one site are also common. See, *e.g.*, *Phillips*, 367

F.3d at 850-851 (landowner, landowner's employee, and passive investor all indicted).

2. Criminal statutes like the CWA are subject to the rule of lenity, which requires that they be narrowly construed.

This Court has made clear that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987); see also *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1787 (2005) (Ginsburg, J., dissenting, joined by Breyer, Scalia, and Souter, JJ.) ("the rule of lenity counsels against" adopting a broad statutory reading); *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408 (2003) ("'this being a criminal statute, it must be strictly construed'"); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952) ("We should not derive criminal outlawry from some ambiguous implication").

This rule stems not "out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Rather, it is "founded on two policies that have long been part of our tradition." *Bass*, 404 U.S. at 348. The first is that "'a fair warning should be given to the world in language that the common world will understand.'" *Ibid.* "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952). The second reflects our "instinctive distaste

against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348.

The rule of lenity applies to criminal provisions premised on the Commerce Clause. In *Bass*, for example, this Court considered whether the jurisdictional hook of a firearms statute—"in commerce or affecting commerce"—applies to "possesses" and "receives," as well as "transports." Applying the rule of lenity, it held that it does. 404 U.S. at 347. In *Rewis*, the Court held that the rule of lenity compelled a narrow interpretation of the Travel Act, which prohibited interstate travel in furtherance of illicit gambling. 401 U.S. at 809, 811-812. Because the statute did not indicate an intent to implicate those who cross state lines to gamble, the Court applied the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 812; see also *United States* v. *Plaza Health Labs*, 3 F.3d 643, 649 (2d Cir. 1993) (applying rule of lenity to construe the CWA term "point source" narrowly and dismissing criminal prosecution); *United States* v. *Borowski*, 977 F.2d 27, 31-32 (1st Cir. 1992) (strictly construing "knowing endangerment" provision of CWA and vacating conviction).

The rule of lenity also applies to civil applications of statutes with criminal consequences, like the CWA. "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 384 n.8 (2004); see also *Clark* v. *Martinez*, 125 S. Ct. 716, 724 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation"). Thus, in *United States* v. *Thompson/Center Arms Co.*, this Court employed the rule

of lenity to resolve "a tax statute * * * in a civil setting" in the defendant's favor. 504 U.S. 505, 517-518 & n.10 (1992) (plurality opinion); *id.* at 519 (Scalia, J., concurring in judgment) (also invoking rule of lenity). See also *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) (applying lenity to a criminal statute invoked in a civil action); *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

The jurisdictional provisions of the CWA must be construed in civil cases like these with the same lenity that guides their interpretation in a criminal prosecution. 33 U.S.C. §§ 1344, 1362(7). The Court "must interpret the statute consistently" in both contexts. *Leocal*, 125 S. Ct. at 384.

3. The Corps' theory of jurisdiction leaves citizens in considerable doubt whether their actions are criminal.

The jurisdictional line set forth in the CWA is bright and raises no issues triggering the rule of lenity. In contrast, the Corps' approach creates enormous practical problems for citizens seeking to know if their proposed conduct is criminal or legitimate. Indeed, so uncertain is the application of the rule it advocates that the Corps has been unable to make consistent jurisdictional determinations. See UNITED STATES GENERAL ACCOUNTING OFFICE, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 3 (Feb. 2004).

The Corps' "any hydrological connection" theory—and its view that Section 404 even reaches wetlands that are merely physically proximate to waters hydrologically connected to navigable waters—present a frightening lack of "fair warning * * * that the common world will understand." *Bass*, 404 U.S. at 348. It is impossible for every owner of a wetland—let alone every laborer or contractor

working on the land—to know where every molecule of water eventually flows. Yet the Corps contends that a landowner or anyone working on the land falls under its jurisdiction if a molecule of wetlands water wends it way through multiple non-navigable, even ephemeral, waterways before eventually reaching a navigable waterway 20 miles (*Rapanos*), 32 miles (*United States* v. *Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)), or even 235 miles away. *United States* v. *Buday*, 138 F. Supp. 2d 1282, 1291 (D. Mont. 2001). The result of the Corps' theory is that farmers and other landowners are burdened with a daunting and unrealistic task of determining every avenue of every molecule of water in a wetland on their property, under any weather conditions, so as to avoid the risk of criminal prosecution.

Furthermore, under the Corps' theory a wetland that once had no hydrological connection to a navigable waterway may, with no warning, transform into a wetland within the Corps' realm. A sudden and severe rainstorm creating sheet flow across the land's surface may establish a hydrological connection with a distant lake where none existed three hours before. A far-away landslide, felled tree, or construction of a ditch, culvert, or sewer line may suddenly divert water to a navigable waterway. A farmer consequently must not only ascertain the path of all his or her water. He or she must also be aware of every component of the hydrological system between his or her property and a navigable waterway, and update that knowledge constantly or face severe repercussions. Incarceration and seven-figure penalties should not depend on the potentiality that a "drop of rainwater" will somewhere "intermingle with water" of a navigable river. *United States* v. *Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877-878 (N.D. Ind. 2001), *aff'd*, 335 F.3d 598 (7th Cir. 2003).

This is precisely the lack of "fair warning" that the rule of lenity is designed to combat. The rule compels a reading of the CWA that does not subject landowners to severe penalties for conduct that only the most detailed hydrological study could reveal to be within the scope of the CWA's criminal provisions, and then only uncertainly and provisionally.

The Corps' desire to control any wetland in the country, no matter how limited (or in the Carabells' case, nonexistent) its connection to a navigable waterway, conflicts with the second principle supporting the rule of lenity. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," legislatures—not courts or administrative agencies—"should define criminal activity." *Bass*, 404 U.S. at 348. In the face of the CWA's text, and in spite of *SWANCC*, the Corps has employed a theory of jurisdiction that turns on the most remote and ephemeral hydrological connections, extending its penal power to virtually any wet patch of ground anywhere in the country. That is not how Congress defined criminal activity in the statute and is far too indeterminate to survive scrutiny. See *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 621 (1946) (requiring criminal regulatory provisions to be "explicit and unambiguous" because "[i]n a very literal sense the liberties and fortunes of others may depend upon [the regulator's] definitions and specifications").

If the text of the CWA left any doubt about the Act's scope—and as we have explained it does not—that language should be construed in accordance with the rule of lenity, resolving any doubt in favor of defendants here.

CONCLUSION

The judgments of the Sixth Circuit should be reversed.

Respectfully submitted.

JULIE ANNA POTTS
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Avenue, S.W.
Suite 800
Washington, D.C. 20024
(202) 406-3600

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY A. BERGER
JAMES P. GIGNAC
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

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In The Supreme Court of the United States

JOHN A. RAPANOS, *et ux., et al., Petitioners,*

v.

UNITED STATES

JUNE CARABELL, *et al., Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE SUGGESTING REVERSAL IN NOS. 04-1034 AND 04-1384

HARRY M. NG
RALPH J. COLLELI JR.
ERIK G. MILITO
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

THOMAS SAYRE LLEWELLYN
(COUNSEL OF RECORD)
5125 MacArthur Blvd., NW
Suite 32-A
Washington, DC 20016
(202) 237-7291

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The American Petroleum Institute ("API") respectfully submits this brief *amicus curiae*, suggesting reversal in both of these consolidated cases. All petitioners and the respondent have granted consent to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry.[1] API regularly represents the petroleum and natural gas industry in administrative rulemaking proceedings in the various state and federal agencies, and in litigation in state and federal courts.

The industry operates tens of thousands of oil and gas production wells and thousands of pipeline facilities (*e.g.*, pump stations, terminals, and breakout tanks), many of which are located great distances from any "navigable waters" in the traditional sense of the term. Under the reasoning of the Sixth Circuit in the cases at bar, such remotely located facilities could nonetheless be subject to regulation under the Clean Water Act ("CWA") if they are located near any land or aquatic area that eventually drains to any "navigable waters." This would be so even in those cases where there is no reasonable likelihood that a release of oil would ever reach "navigable waters."

Also, many petroleum refining facilities and natural gas plants operate storm water retention basins that, while located near "navigable waters" in the traditional sense of the

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[1] No counsel for any party in these consolidated cases has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief.

term, have no surface hydrological connection with such "navigable waters." Under the Sixth Circuit's ruling in the *Carabell* case that *mere proximity* to a regulated water body renders a given aquatic area itself subject to CWA regulation, storm water retention basins could be subject to regulation, even though they lack any surface hydrological connection to "navigable waters."

Section 311 of the CWA, 33 U.S.C. § 1321 (2000), regulates discharges of oil to the "navigable waters of the United States," and directs the Environmental Protection Agency ("EPA") to promulgate regulations to prevent and remediate such discharges. In July 2002, EPA promulgated revised regulations known as the Spill Prevention Control and Countermeasure or "SPCC" regulations under section 311. 67 Fed. Reg. 47042 (July 17, 2002) (codified at 40 C.F.R. Part 112 (2005)). The SPCC regulations contain a definition of "navigable waters" nearly identical to the one that the Sixth Circuit applied in the present cases. API is currently prosecuting an action for judicial review of that definition in federal district court *American Petroleum Institute v. Johnson*, No. 02-2247 (D.D.C. filed Nov. 14, 2002).

SUMMARY OF THE ARGUMENT

The Sixth Circuit erred in holding that any hydrological connection with traditional navigable waters renders an area a "navigable water" and in holding that mere proximity to a regulated water renders an area a "navigable water." A review of the language and the full legislative history of the CWA makes clear Congress intended "navigable waters," "waters of the United States," and "navigable waters of the United States" to include only traditional navigable waters and their abutting wetlands.

This does not mean that pollution of non-navigable waters cannot be regulated under the CWA if such pollution results in the addition of pollutants to traditional navigable waters. Congress deliberately employed the "discharge" mechanism to provide for regulation of pollution of traditional navigable waters from upstream sources. But this is quite different from (1) designating as "navigable waters" any and all areas or water bodies that have any hydrological connection with traditional navigable waters or (2) designating as "navigable waters" any water that is merely *near* traditional navigable waters. Moreover, as this Court emphasized in *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), Congress intended to preserve primary state authority over activities affecting only state waters.

Under the Sixth Circuit's theory in the *Rapanos* case, few areas of the United States (including normally dry land areas) would *not* be "navigable waters" subject to pervasive federal regulation, because most areas have a drainage path that *eventually* leads to traditional navigable waters. Worse, under the Sixth Circuit's theory in the *Carabell* case, mere *proximity* to another area that *eventually* drains to traditional navigable waters would render an area a "navigable water" subject to federal regulation. The judgments in both cases are founded on a faulty construction of the CWA and should be reversed.

ARGUMENT

CONGRESS LIMITED "NAVIGABLE WATERS" TO TRADITIONAL NAVIGABLE WATERS (AND ABUTTING WETLANDS); DEVISED THE "DISCHARGE" MECHANISM TO PROTECT "NAVIGABLE WATERS" FROM UPSTREAM POLLUTION; AND ALLOWED STATES TO PROTECT STATE WATERS.

I. The Importance Of Section 311 To Construction Of The Clean Water Act

The Federal Water Pollution Control Act ("FWPCA," now commonly known as the Clean Water Act or "CWA") was originally enacted in 1948, ch. 758, 62 Stat. 1155 (1948), and has been amended many times. Often overlooked in the construction of the scope of the CWA is the history of section 311, 33 U.S.C. § 1321 (2000). Section 311 traces its roots to the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). That Act added to FWPCA a new section 11, entitled "Control Of Pollution By Oil" and codified at 33 U.S.C. § 1161 (1970) (current version at 33 U.S.C. § 1321 (2000)).

Section 11 prohibited the discharge of oil in harmful quantities "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." 33 U.S.C. § 1161(b)(2) (1970) (current version at 33 U.S.C. § 1321(b)(3) (2000)). It also required reporting of discharges; established liability for discharges; and directed the President to issue regulations "establishing procedures, methods, and requirements for equipment to prevent discharges." 33 U.S.C. §§ 1161(b)(4), (f), and (j)(1)(C) (1970) (current versions at 33 U.S.C. §§ 1321(b)(5), (f), and (j)(1)(C) (2000)).

Although the term "navigable waters of the United States" was used throughout section 11, the term was not defined by statute. However, the term already had a well-established meaning in federal law, *i.e.*, those waters that are, were, or with reasonable improvements could be, used for navigation in interstate commerce.[2] *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-611 (3d Cir. 1974); *United States v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974). *See also* Black's Law Dictionary 1179 (4th ed. rev. 1968). Congress must be presumed to have used the term in 1970 in its traditional sense, unless the statute dictates otherwise. *McDermott v. Wilander*, 498 U.S. 337, 342 (1991); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

The 1970 enactment did not dictate otherwise. In fact, the Senate floor manager's summary of conference action on the 1970 Water Quality Improvement Act confirmed that Congress used the term in its traditional sense:

> One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."
>
> The conference agreement does not define the term. Based on the history of consideration of this legislation it is obvious that its provisions and the extent of application should be construed broadly. It is intended that this term include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law

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[2] API refers to such waters throughout this brief as "traditional navigable waters."

> which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

116 Cong. Rec. 8985 (March 24, 1970).[3] Moreover, in 1971, EPA's General Counsel opined that the term "navigable waters of the United States" was used in its traditional sense in the 1970 Act. *See* EPA General Counsel Opinion (Dec. 9, 1971).

Two years after enactment of section 11, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (hereafter, "1972 Amendments"). Pub. L. No. 92-500, 86 Stat. 816 (1972). The 1972 Amendments carried forward the oil pollution control provisions of section 11, with some amendments not relevant here, and redesignated section 11 as section 311. Pub. L. No. 92-500, § 2, 86 Stat. 862 (1972) (current version at 33 U.S.C. § 1321 (2000)). The Conference Report stated that section 311 was intended to be "basically the same as

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[3] Senator Muskie later used similar language to describe the CWA section 502(7) definition of "navigable waters" – added by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) – in his manager's statement on those 1972 Amendments. *See infra* at 11.

existing law," *i.e.*, basically the same as the 1970 enactment. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 132, 133 (1972), *reprinted in* 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 at 315, 316 (1973) (hereafter, "1972 Legislative History"). Under then existing law, the "navigable waters of the United States" meant traditional navigable waters, as shown above.

It is possible, of course, that Congress intended section 311 to have a narrower scope than other provisions of the CWA.[4] However, it is the position of the United States that section 311 has the same scope as sections 404 and 502(7), 33 U.S.C. §§ 1344, 1362(7) (2000) (at issue here), as well as section 402, 33 U.S.C. § 1342 (2000). This is demonstrated by the practically identical language of the several definitions of "navigable waters" or "waters of the United States" in the regulations that purportedly implement those statutory provisions. *Compare* 33 C.F.R. § 328.3(a) (2005) *with* 40 C.F.R. § 112.2 (2005) *and* 40 C.F.R. § 122.2 (2005). If all of those statutory provisions do have the same scope, then the history of section 311 must be considered in defining that scope.

The history of section 311 establishes that its original scope was limited to traditional navigable waters, and that Congress did not intend to enlarge that scope (*i.e.*, did not intend to depart dramatically from "existing law") in the 1972 Amendments. Assuming, *arguendo*, that the scope of section 311 is the same as the scope of the rest of the CWA,

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[4] In fact, in its pending motion for summary judgment in *API v. Johnson*, No. 02-2247 (D.D.C. filed Nov. 14, 2002), API has argued in the alternative that if other provisions of the CWA are held to reach far beyond traditional navigable waters in their use of the term "navigable waters" or "waters of the United States," then section 311 must have a narrower scope than the rest of the CWA.

any suggestion that Congress intended to go far beyond traditional navigable waters in sections 404 or 502(7) is extremely difficult to reconcile with the history of section 311.[5] In fact, as shown below, the language and legislative history of those other provisions establish a continued focus upon protecting traditional navigable waters (waters subject to the federal servitude), while otherwise preserving state authority to protect state waters.

II. Congress' Objectives In The 1972 Amendments

In addition to carrying forward the oil spill prevention provisions of former section 11 (now section 311), the 1972 Amendments added significant new regulatory programs aimed at protecting water quality. In particular, the 1972 Amendments established the National Pollutant Discharge Elimination System ("NPDES"), which requires a permit from EPA for the discharge of "pollutants" to the "navigable waters;" and the section 404 program, which requires a permit from the Army Corps of Engineers ("Corps") for the discharge of "dredged or fill material" to the "navigable waters." Pub. L. No. 92-500, § 2, 86 Stat. 844, 880, 884, 886 (1972) (current versions at 33 U.S.C. §§ 1311, 1342, 1344, 1362(12) (2000)).

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[5] In the late 1970's, the courts of two federal circuits held that the section 502(7) definition of "navigable waters" governs the scope of section 311, and that navigability is irrelevant. However, those cases were decided long before *SWANCC*, and it does not appear that the courts considered the full history of section 311, as discussed herein. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). *See Ward v. Coleman*, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979) (dictum), *rev'd*, 448 U.S. 242 (1980); *Wyoming v. Hoffman*, 437 F. Supp. 114, 115-16 (D. Wyo. 1977) (dictum).

In a new section 502(7), the 1972 Amendments defined the pivotal term "navigable waters" as "the waters of the United States, including the territorial seas." Pub. L. No. 92-500, § 2, 86 Stat. 886 (current version at 33 U.S.C. § 1362(7) (2000)). At the same time, Congress declared its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ." Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (current version at 33 U.S.C. § 1251(b) (2000)).

A. The language of the definition of "navigable waters"

Exactly why Congress chose to define "navigable waters" as "the waters of the United States" is not clear from the face of the statute. However, given Congress' stated policy of preserving state primacy over state water resources, it may well be that Congress wanted to distinguish federal waters (covered under the Act) from other waters (to be regulated by the states). After all, the term "navigable waters" has been described as "defin[ing] a federal servitude, derived from the commerce clause, that overlays what might otherwise be considered state waters," *Northern Cal. River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008, *18 (N.D. Cal. Jan. 23, 2004).

In any event, both the phrase "navigable waters" and the phrase "waters of the United States" had an established meaning in federal law, *i.e.*, traditional navigable waters. Congress had previously used the terms "waters of the United States" and "navigable waters of the United States" interchangeably in section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (2000). Section 10 has been held to apply only to traditional navigable waters. *United States v. Stoeco*

Homes, Inc., 498 F.2d 597, 608-10 (3d Cir. 1974). Moreover, as long ago as 1871, the District Court in *The Daniel Ball* case had used the phrase "waters of the United States" to mean traditional navigable waters:

> I regard it to be well settled doctrine of the supreme court of the United States, that all waters within the United States which are navigable for the purpose of commerce, or in other words, waters whose navigation successfully aids commerce, are *waters of the United States*.

The Daniel Ball, 6 F. Cas. 1161, 1163 (W.D. Mich.), *rev'd on other grounds*, 77 U.S. (10 Wall.) 557 (1871) (emphasis added). *See* Black's Law Dictionary 1761 (4th ed. rev. 1968) (defining "Waters of the United States" and citing *The Daniel Ball*).

Moreover, had Congress intended in the 1972 Amendments to cover purely state waters, in addition to traditional navigable waters, it knew how to say so. In the Water Quality Act of 1965, Congress had provided for development grants to states and cities for controlling discharges of inadequately treated sewage into "any waters." Pub. L. No. 89-234, § 3, 79 Stat. 903, 905 (1965). Congress could have employed the same term in the 1972 Amendments, but instead used the narrower term "waters of the United States."

B. The legislative history of the definition

The legislative history of the 1972 Amendments confirms that Congress used the terms "navigable waters" and "waters of the United States" in their traditional sense. It also demonstrates Congress' intent that the concept of

traditional navigable waters be understood by reference to modern federal case law. *See generally* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044-46, 11048-49 (2002).

The explanatory statements of the Senate and House floor managers both describe "navigable waters" with reference to their use as a "highway" or part of a "highway" in interstate commerce. *See* 1 1972 Legislative History at 178 (Statement of Senator Muskie), 250-251 (Statement of Congressman Dingell). Senator Muskie used language in his statement nearly identical to language he had used to describe the term "navigable waters of the United States" in section 11 two years earlier. *Compare* 1 1972 Legislative History at 178 *with* 116 Cong. Rec. 8985 (March 24, 1970).

At the same time, the two floor managers' statements and the Conference Report all expressed a desire that the term "navigable waters" be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." 1 1972 Legislative History at 178, 251, 327. The legislative history compiled by the Congressional Research Service does not explain what were the "agency determinations" made for "administrative purposes" about which Congress had been concerned. However, a broader look at the legislative history shows that Congress had been frustrated with the Corps of Engineers' implementation of the Rivers and Harbors Act and with EPA's interpretation of the 1970 version of FWPCA.

Before enactment of the 1972 amendments to FWPCA, the Rivers and Harbors Act had been viewed as a potentially useful federal mechanism for controlling water pollution. However, until 1970, the Corps had not regulated

dredging or filling in aquatic areas shoreward of harbor lines, even though under the old *Daniel Ball* definition of "navigable waters of the United States," the Corps plainly had the authority to regulate such areas. The House Committee on Government Operations expressly found fault with the Corps' policy, as reflected in its report of March 1970, entitled "Our Waters And Wetlands: How The Corps of Engineers Can Help Prevent Their Destruction And Pollution." H.R. Rep. No. 917, 91st Cong., 2d Sess. 6-10 (1970).[6]

Another concern was that the Corps had not been regulating waters not presently navigable in fact, even though under cases such as *Economy Power & Light Co. v. United States*, 256 U.S. 113 (1921) and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the "waters of the United States" included waters that had at one time been navigable in fact (although presently obstructed) and waters that could be navigable, with reasonable improvement. In 1972, the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations held hearings "concerning the role of the Corps of Engineers in administering and protecting our Nation's wetlands and waterways," and in August the full committee issued a report, entitled "Increasing Protection For Our Waters, Wetlands, And Shorelines: The Corps Of Engineers." H.R. Rep. No. 1323, 92d Cong., 2d Sess. 1 (1972). In its report, the committee criticized the Corps for its narrow approach:

> The corps' regulations currently define navigable waters as those "which are

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[6] In May 1970, the Corps changed course and promulgated a rule regulating activities shoreward of harbor lines. 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. § 209.150).

> navigable in fact when they are used, or are susceptible of being used, in their ordinary condition," for conducting trade or travel "in the customary modes of trade and travel on water." (33 C.F.R. 209.260 (a).) That language is based on similar language used over 100 years ago in the Supreme Court's opinion in *The Daniel Ball* . . . .
>
> However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc.

Id. at 29-30.[7]

Finally, the Corps had declined to exercise jurisdiction over intrastate lakes, even if navigable-in-fact, because such lakes did not, in the precise words of *The Daniel Ball*, "form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is . . . conducted by water," 77 U.S. (10 Wall.) at 563. The Committee on Government Operations apparently believed that railroad or highway links between navigable intrastate lakes and other states should be sufficient to establish federal jurisdiction, and that modern case law supported this view:

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[7] Congressman Dingell repeated language from this hearing report in his floor statement on the 1972 Amendments. *See* 1 1972 Legislative History at 250-51.

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah* v. *United States*, 403 U.S. 9, 11 (1971); *U.S.* v. *Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

H.R. Rep. No. 1323, 92d Cong., 2d Sess. 30 (1972).

Although Congress' expressed discontent was focused on the Corps, Congress presumably also was aware that in 1971, EPA's General Counsel had issued an opinion concerning the scope of the term "navigable waters of the United States" in then section 13 of the FWPCA, which regulated sewage discharges from vessels. EPA General Counsel Opinion (Dec. 9, 1971). The opinion addressed navigable intrastate waters lacking a *water* connection to other states, which might nonetheless be linked to other states by railroads or highways (essentially the same issue on which the Committee on Government Operations had disagreed with the Corps, discussed immediately above).

The opinion said that "[s]uch waters have never been held to be within the 'navigable waters of the United States,'

and the possibility of securing such a holding is remote." *Id.* Significantly, the General Counsel recommended against asserting authority over such waters because that action would only marginally increase federal regulatory coverage, and "[t]his additional margin . . . does not appear to justify the legal and *administrative difficulties* it presents." *Id.* (emphasis added).

Thus, it is clear that the "agency determinations" made for "administrative purposes" about which Congress complained in the 1972 legislative process involved the federal agencies' failure to assert jurisdiction over traditional navigable waters as fully as justified under modern federal case law. The focus of Congress' frustration appears to have been the Corps, but Congress was likely also disappointed with EPA's position.

Thus, in defining "navigable waters" as the "waters of the United States" in the 1972 FWPCA Amendments, Congress intended only to reach traditional navigable waters, although it intended that such waters be understood to be as extensive as described in modern federal case law. In other words, Congress wanted to ensure that the agencies would exercise their full constitutional power *over navigation.*

In *SWANCC*, this Court confirmed that Congress' focus in 1972 was upon traditional navigable waters. 531 U.S. at 168 & n.3, 172. This Court also confirmed its opinion in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), that in the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), Congress had acquiesced in the Corps of Engineers' assertion of CWA jurisdiction over wetlands abutting traditional navigable waters. 531 U.S. at 167, 170-72.

C. The regulation of the "discharge of pollutants"

Although Congress focused the federal effort upon protection of water quality in traditional navigable waters (and their abutting wetlands), and chose to have the states retain primary authority to protect water quality in waters traditionally regarded as state waters, *see SWANCC*, 531 U.S. at 166-67, Congress gave EPA and the Corps adequate tools to protect traditional navigable waters from pollution from or through upstream sources, such as non-navigable tributaries. Specifically, Congress prohibited the "discharge" of pollutants, except in compliance with a section 402 NPDES permit or a section 404 permit to discharge "dredged or fill material." 33 U.S.C. § 1311(a) (2000). *See also* 33 U.S.C. §§ 1321(a)(2), (b)(3) (2000).

The term "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000). The term "point source" is defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch, channel*, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000) (emphasis added). Thus, the addition of pollutants to navigable waters through a ditch is prohibited, except in compliance with a permit. But that does not mean the ditch is a "navigable water."

Similarly, a common dictionary definition of "channel" is "the bed where a natural stream of water runs." Webster's Ninth New Collegiate Dictionary 226 (1988). Thus, a non-navigable tributary adding pollutants to a navigable water (either directly or through another non-

navigable tributary[8]) can be a "point source" and subject to regulation, but not because the non-navigable tributary is a "navigable water" or "water of the United States." Conversely, a ditch or non-navigable channel that receives pollutants but that itself cannot reasonably be expected to convey pollutants to navigable waters (either directly or through another point source) is *not* subject to regulation under the CWA. However, it can still be regulated as a state water by the applicable state. *See* S. Novick (ed.), 1 Law Of Environmental Protection § 7:9 & n.2 (2004) ("[C]ommon . . . is a provision prohibiting the 'discharge' of any 'pollutant' into the 'waters of the state' without a permit. Virtually every state has a provision of this type.").

There are many cases where it is highly probable that a discharge to a tributary (in particular a primary tributary) will result in an addition of pollutants to traditional navigable waters. But there are also many cases where a discharge to a remote "tributary" cannot reasonably be expected to reach traditional navigable waters.

This is certainly true in the oil and gas industry, where many production wells and pipeline facilities are located in arid areas near normally dry streambeds or washes that eventually lead through a lengthy series of drainages to traditional navigable waters. A spill of oil or produced water could reasonably be expected to reach the dry streambed or wash, but in many such cases could not reasonably be expected to reach traditional navigable waters. While such a spill may never reach traditional navigable waters, such a spill can be cleaned up before a precipitation event even

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[8] *See South Fla. Water Mgt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004) ("a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' ").

begins to cause any migration toward traditional navigable waters.

In such instances, the CWA would not apply. However, the states may, and generally do, regulate discharges of oil to state waters, and require that they be cleaned up promptly. *See* D. Selmi & K. Manaster, State Environmental Law § 18:1 (2003) ("Liability for oil spills has long been a prominent feature on the landscape of state environmental law"). *See generally id.* at ch. 18.

III. Where The Sixth Circuit Errs

Underlying the Sixth Circuit's opinions in the present cases is the notion that the CWA was intended to protect water quality in traditional navigable waters. That much of the Sixth Circuit's reasoning is surely correct, given this Court's conclusion in *SWANCC* that "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172.

But the Sixth Circuit errs in its understanding of how Congress went about protecting traditional navigable waters. In essence, the Sixth Circuit's theory is that because **A** (a non-navigable water or wetland) might somehow affect **B** (a traditional navigable water), therefore **A** ***is*** **B**. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004) ("'[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters.'") (citation omitted). Yet this theory enjoys no support in the statute. It is made of whole cloth, presumably in an effort to accomplish the perceived ends of the statute.

This Court has often cautioned against reliance upon the general ends of a statute to enlarge or otherwise alter its intended reach. This Court has explained that

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986). *See also Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in the original).

In fact, CWA jurisprudence in most of the lower federal courts appears to have been largely purpose-driven both before and after this Court's decision in *SWANCC*. Before *SWANCC*, the prevailing theory was that to protect water quality as broadly as possible, Congress had directed EPA and the Corps to regulate any waters that might be regulated under the federal power to regulate interstate commerce. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("Every court to discuss the issue has used a commerce power approach . . . ."). Following *SWANCC*'s rejection of this "full extent of the commerce power" theory, many of the federal circuits

(including the Sixth Circuit here) have shifted to a new purpose-driven theory, *i.e.*, since Congress wanted to protect traditional navigable waters, any aquatic area with any hydrological connection with traditional navigable waters must itself be *deemed* a traditional navigable water, and subject to federal protection. *See United States v. Gerke Excavating Inc.*, 412 F.3d 804, 807 (7th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3309 (U.S. Nov. 11, 2005) (No. 05-623); *Rapanos*, 376 F.3d at 639; *United States v. Deaton*, 332 F.3d 698, 711-12 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).

Yet Congress' very specific regulatory scheme in the CWA must be given effect, even though some may believe that scheme does not go far enough to serve the ends of the statute or represent the perfect balance of policy choices. In the CWA, Congress asserted authority over traditional navigable waters (and their abutting wetlands), including the authority to protect such waters from upstream pollution. But Congress chose to protect traditional navigable waters by regulating additions of pollutants to such waters (whether directly or through ditches, channels, or other "point sources") -- *not* by rendering subject to federal regulation all activities affecting non-navigable, state waters. Congress relied upon the states to regulate activities affecting only state waters.

Here, if the Corps can show Mr. Rapanos' wetland-filling activities result in an addition of pollutants to traditional navigable waters, then those activities may be regulated. But this is quite different from the Corps' current approach, approved by the Sixth Circuit, under which the mere potential for drainage from a distant wetland to a traditional navigable water renders the wetland itself a "navigable water."

Similarly, if the Corps can show that filling of the Carabells' property results in an addition of pollutants to traditional navigable waters, then that activity may be regulated. But mere proximity to a traditional navigable water, in the absence of any hydrological connection, cannot render a wetland a "navigable water." In fact, in the *Carabell* case, the only proximity is to a non-navigable "tributary" of a traditional navigable water. Thus, the wetlands on the Carabells' property cannot even be said to be "inseparably bound up" (*SWANCC*, 531 U.S. at 167) with traditional navigable waters.

IV. Implications Of The Sixth Circuit's Holdings

If, as the Sixth Circuit holds, any hydrological connection with a traditional navigable water renders an area a "navigable water," then even normally dry hillsides would be "navigable waters," assuming there is at least occasional precipitation. One could start tracing paths of drainage at the highest point in the Rocky Mountains and follow them to the sea – and every land mass drained along the way would be "navigable waters." Thus, the potential area of the nation covered as "navigable waters" could be far greater even than the 100 million acres of wetlands (an area itself the size of California) that petitioners Rapanos, *et al.* referred to in their reply brief on the petition for certiorari, *see* Reply Br. of Petitioners Rapanos, *et al.* (On Petition) at 10.

As a result, remote oil and gas production and pipeline facilities could be required to prepare and implement SPCC plans under section 311, even where they have no reasonable likelihood of ever affecting traditional navigable waters. Also, such facilities currently are subject to fines for spills to remote, dry stream beds and washes, even if the spills are promptly cleaned up and never get

anywhere near navigable waters. *See* 33 U.S.C. §§ 1321(b)(6), (b)(7) (2000).

Moreover, under the mere proximity test of the *Carabell* case, man-made retention ponds at industrial facilities, such as petroleum refineries, pipeline facilities, or natural gas plants (located close to, but with no surface hydrological connection to, traditional navigable waters), could be "navigable waters." This would make no sense, as such ponds are specifically designed to prevent or limit the addition of pollutants to traditional navigable waters. Their mere operation in catching and holding pollutants could now be subject to NPDES permitting.[9]

Even assuming, *arguendo*, that a "significant nexus" with traditional navigable waters is enough to render any non-navigable water or wetland "navigable waters," *see Rapanos*, 376 F.3d at 639, the Sixth Circuit's theories make a mockery of this Court's concept. *Cf. SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."). If, as under *Rapanos*, *any* hydrological connection constitutes a "significant nexus," then very little land area would not have a "significant nexus" with traditional navigable waters. *Carabell* makes the mockery complete, holding that merely being *close* to an area that has *any* hydrological connection with traditional navigable water establishes a "significant nexus" with traditional navigable waters.

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[9] In some cases, water from the retention basins is pumped to the facility's waste water treatment plant and discharged to navigable waters. That discharge is subject to NPDES permitting. But that is quite different from regulating the retention basins themselves as "navigable waters."

CONCLUSION

The judgments in cases 04-1034 and 04-1384 are based on a faulty construction of the CWA and should be reversed.

Respectfully submitted,

December 2, 2005

THOMAS SAYRE LLEWELLYN
(COUNSEL OF RECORD)
5125 MacArthur Blvd., NW
Suite 32-A
Washington, DC 20016
(202) 237-7291

HARRY M. NG
RALPH J. COLLELI JR.
ERIK G. MILITO
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

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In The
Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; And PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

NANCY STROUD*
LEWIS, STROUD & DEUTSCH, L.P.
1900 Glades Road, Suite 251
Boca Raton, FL 33431
(561) 826-2800

LORA A. LUCERO, AICP
122 S. Michigan Avenue
Suite 1600
Chicago, IL 60603
(505) 247-0844

**Counsel of Record for Amicus Curiae American Planning Association*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to non-navigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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INTEREST OF *AMICUS CURIAE*[1]

The American Planning Association ("APA") is a nonprofit, public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels – including land use, economic, and social planning. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 19 divisions devoted to specialized areas of planning, including the Environment, Natural Resources and Energy Division, which promotes the adoption of scientifically sound and effective policies to promote protection of the environment and the wise and sustainable use of natural resources and energy. The APA represents more than 38,500 professional planners, commissioners, and citizens involved in formulating and implementing planning policies and land-use regulations.

The APA has submitted *amicus curiae* briefs in many landmark cases of importance to the planning profession, including: *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886,

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

120 L.Ed.2d 798 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); and most recently in *Kelo v. City of New London*, 125 S.Ct. 2655, 73 USLW 4552, 162 L.Ed.2d. 439 (2005); *Lingle v. Chevron*, 125 S.Ct. 2074, 73 USLW 4343, 161 L.Ed.2d 876 (2005); *City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453, 73 USLW 4217, 161 L.Ed.2d 316 (2005); and *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 73 USLW 4507, 162 L.Ed.2d 315 (2005).

As the need arises, the APA develops policy guides that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In April 2002, the Policy Guide on Wetlands was ratified by the Board of Directors. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

STATEMENT OF THE CASE

Amicus American Planning Association adopts the statement of the case as set forth by Respondent.

SUMMARY OF ARGUMENT

At the heart of Petitioners' position, and the amici that support them, is their desire to escape the jurisdictional requirements of the Clean Water Act in order to avoid the regulatory oversight needed to protect wetland resources. While this position may be consistent with the immediate and short-term needs of the current property owners, it is short-sighted and in conflict with the public interest and the needs of society in the long-term.

Wetlands are complex and critical resources which should be protected, enhanced and restored, where feasible, in order to increase the quality and quantity of the nation's wetland resource base. The American Planning Association supports the goal of no net loss of the nation's remaining wetlands. This goal requires reasonable regulatory oversight of activities which may impact wetlands and a broad interpretation of "navigable waters" to include isolated and non-navigable waters.

Although voluntary wetland conservation efforts are commendable and should be encouraged, they cannot replace regulatory oversight and permitting processes. Effective planning must engage and inform the public and property owners about the importance of wetland protection. In addition to the important incentive programs that encourage property owners to conserve wetlands, there are a number of regulatory mechanisms that can successfully address the goal of wetland protection in the context of growth and development.

ARGUMENT

I. Wetlands Are A Critical Natural Resource In Need Of Protection

The great naturalist and writer Aldo Leopold eloquently explained in his essay "The Round River":

> If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.[2]

Wetlands are perhaps the most over-worked, undervalued and least understood and appreciated natural resource on the planet. In their natural state, they perform ecological functions which are vitally important to the environment and economic health of the nation and are impossible or costly to replace.[3] From flood protection, erosion control, storm water absorption, filtering of sediment and pollutants, aquifer recharge, fish and wildlife habitats, carbon sinks, and open space – wetlands are unsurpassed in their ability to moderate the damaging impacts from human activities and development.[4]

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[2] Leopold, Aldo, *The Round River*, Luna B. Leopold, ed. ROUND RIVER: FROM THE JOURNALS OF ALDO LEOPOLD, Minocqua, WI: Northwood Press, 1991.

[3] *See*, Bates, Sarah F., David H. Getches, Lawrence J. MacDonnell, Charles F. Wilkinson, SEARCHING OUT THE HEADWATERS – CHANGE AND REDISCOVERY IN WESTERN WATER POLICY, Island Press, 2003.

[4] *See*, Noss, Reed F., and Allen Y. Cooperrider, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY, Island Press, 1994.

Planners have an important role and responsibility in protecting wetlands. They help the public and elected officials understand the importance of the wetland resources; they assist in the preparation of community plans which balance the rights of the property owner with the needs of the community-at-large and the natural environment; they understand the multitude of land use tools available and prepare appropriate local regulations to implement the adopted plans; they help the property owner and developer navigate through the oftentimes complex regulatory world involved in wetlands protection; they continually reassess the effectiveness of their plans and land use tools; and they engage in public planning processes to update and amend the plans and regulations. Is protection of our nation's wetland resources worth this effort? The American Planning Association believes it is, because all wetlands, including isolated wetlands, perform valuable ecological functions.

Wetlands protect the quality of surface waters by retarding the erosive forces of moving water. They provide a natural means of flood control, protecting against the loss of life and property. The catastrophic flooding in New Orleans heightened the public's awareness of the critical role of wetlands as a natural approach to flood control. Wetlands improve water quality by intercepting and filtering out waterborne sediments, excess nutrients, heavy metals and other pollutants. Wetlands hold enormous amounts of carbon and thus are important in regulating climate as well as recycling carbon.[8]

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[8] Daniels, Tom and Katherine Daniels, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS, Planners Press, American Planning Association, 2003, at 229.

They act as a buffer between land and waterways, and stabilize shorelines. They remove significant amounts of biological oxygen demand (BOD), which leaves more oxygen available for fish and wildlife.[6] By acting as reservoirs or sponges, wetlands accumulate and then slowly release the water they retain, either into streams and rivers or into groundwater to recharge aquifers. This process is especially helpful in maintaining water supplies during times of drought.[7]

Wetlands are also sources of food, shelter, essential breeding, spawning, nesting and wintering habitats for fish and wildlife. These include migratory birds, endangered species and commercially and recreationally important species. By some estimates wetlands are worth tens of thousands of dollars per acre each year for the environmental services they perform.[8]

At the time of the nation's settlement, wetlands represented approximately 221 million acres of the land area in the lower 48 states.[9] By 1997, only 105.5 million acres remained, leaving just 47.7% of the original wetland acreage.[10] Wetlands now occupy about 5.5% of the land surface of the lower 48 states. Three-fourths of the remaining wetlands in the continental United States are privately

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[6] *Id.*

[7] *Id.*

[8] Maltby, Edward, WATERLOGGED WEALTH: WHY WASTE THE WORLD'S WET PLACES? Washington, DC: International Institute for Environment and Health, 1986.

[9] Dahl, T.E., 2000, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES 1986-1997. U.S. Department of the Interior, Fish & Wildlife Service, Washington, D.C.

[10] *Id.*

owned and only about 0.5% of these are under some form of conservation protection.[11]

Wetland losses have varied over time.[12] Between the mid-1950s and the mid-1970s, about 11 million acres of wetlands were lost, while 2 million acres of new wetlands were created – an annual loss of approximately 458,000 acres.[13] The net loss of 9 million acres of wetlands in those 20 years was about twice the size of New Jersey. More recently, between 1986 and 1997, the estimated total net loss of wetlands was 644,000 acres or 58,500 acres each year.[14] This significant decline in the rate of wetland loss

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[11] Burke, David, Eric Meyers, Ralph Tiner, Jr. and Hazel Groman. *Protecting Non-Tidal Wetlands.* Chicago: APA, PLANNING ADVISORY SERVICE, Report Number 412/413, 1988.

[12] The first conservation-oriented wetland survey was conducted during the mid-1950s by the U.S. Fish and Wildlife Service (FWS) (1956). In 1974, the FWS launched the National Wetlands Inventory (NWI), a massive project to classify and map virtually all the nation's wetlands. . . . The NWI has estimated total wetlands in the early 1980s to be about 99 million acres in the contiguous states, of which 93.7 million were inland freshwater wetlands and the rest coastal. This acreage represented a loss since the mid-1950s of approximately 14.8 million acres of freshwater wetlands and 482,000 acres of saltwater wetlands. (Frayer et al. 1983).

Platt, Rutherford, H., LAND USE AND SOCIETY – GEOGRAPHY, LAW, AND PUBLIC POLICY, Island Press, 2004.

[13] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *See*, http://www. planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[14] *Id.*, citing STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986-1997. http://training.fws.gov/library/Pubs9/wetlands86-97_highres.pdf [last accessed January 10, 2006] U.S. Fish and Wildlife Service (2000). *See also*, Sibbing, Julie M., *Nowhere Near No-Net-Loss*, National Wildlife Federation. *Available at* http://www.cwn.org/cwn/

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can be attributed, in large part, to the "Swampbuster" provisions in the 1985 Food Security Act and agricultural set-aside programs which accounted for a significant reduction of lands converted to agricultural uses.[15] Between 1986 and 1997, urban development accounted for an estimated 30% of all losses, with agriculture responsible for 26%, silvicultural activities 23% and 21% attributed to rural development.[16] Isolated, non-navigable wetlands are perhaps most vulnerable to the pressures of development because of their location and the relative ease of altering, dredging and filling these particular wetlands.[17]

Twenty-one states have lost more than half of their original wetlands.[18] In the major farming states of California, Illinois, Iowa, Missouri, and Ohio, roughly nine-tenths of the original wetlands are gone, mostly to cropland.[19] About 100 million acres of wetlands remain in the United States, of which about 20 million acres are isolated wetlands and are not part of navigable waterways.[20]

Isolated wetlands have important functional values that warrant protection – stormwater management, water

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files/Nowhere_Near_No-Net-Loss.pdf [last accessed on January 6, 2006].

[15] *Id.*

[16] *Id.*

[17] *See, e.g.*, Daniels, Tom and Katherine Daniels, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS, Planners Press, American Planning Association, 2003; McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004; Noss, Reed F. and Allen Y. Cooperrider, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY, Island Press, 1994.

[18] Daniels, *supra* note 5 at 230.

[19] *Id.*

[20] *Id.*

quality improvement, and wildlife habitat. Removing isolated, non-navigable wetlands from the jurisdiction of the Clean Water Act[21] will result in the loss of critical wetlands across the country.[22]

Thirty-five years ago, Ian McHarg – a teacher, planner, and landscape architect – wrote the seminal book on connecting the built and natural environments in a sustainable fashion. DESIGN WITH NATURE remains in the curriculum of every first-year planning student today.[23] Professor McHarg understood the tension between man and nature as few had before him.[24] He also appreciated the interconnectedness of natural systems.

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[21] 33 U.S.C. § 1251-1376.

[22] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[23] Ian L. McHarg, *Design with Nature*, Doubleday & Company, Inc., Garden City, New York (1969). "Ian McHarg died in 2001 at the age of 80. His brilliance was recognized world-wide, and he went on to be rewarded with the Harvard Lifetime Achievement Award, the National Medal of Art, the Thomas Jefferson Foundation Medal in Architecture, and 12 other international medals and awards, including the very prestigious Japan Prize in City and Regional Planning." *Available at* http://www.upenn.edu/gazette/0501/mcharg.html.

[24]

> If the highest values in a culture insist that man must subdue the earth and that this is his moral duty, it is certain that he will in time acquire the powers to accomplish that injunction. It is not that man has produced evidence for his exclusive divinity, but only that he has developed those powers that permit the fulfillment of his aggressive destructive dreams. He can now extirpate great realms of life: he is the single agent of evolutionary regression.

Id., at 26.

> A single drop of water in the uplands of a watershed may appear and reappear as cloud, precipitation, surface water in creek and river, lake and pond or groundwater; it can participate in plant and animal metabolism, transpiration, condensation, decomposition, combustion, respiration and evaporation. This same drop of water may appear in considerations of climate and microclimate, water supply, flood, drought and erosion control, industry, commerce, agriculture, forestry, recreation, scenic beauty, in cloud, snow, stream, river and sea. We conclude that nature is a single interacting system and that changes to any part will affect the operation of the whole.
>
> If we use water as an indicator of the interaction of natural processes, we see that the forests felled in the uplands may have an identical effect upon the incidence of flood that is accomplished by filling estuarine marshes. Pollution of groundwater may affect surface water resources and vice versa; urbanization will affect the rate of runoff, erosion and sedimentation, causing water turbidity, diminution of aquatic organisms, and a reduction in natural water purification. These, in turn, will result in channel dredging costs, increased water treatment costs, and, possible, flood damages and drought costs.

Id., at 56.

The best way to protect wetland resources is to identify them in plans and develop mechanisms to avoid adverse impacts.[25]

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[25] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.

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II. "Waters Of The United States" Must Be Defined Broadly In Order To Achieve The Federal Goal Of No Net Loss

With the wetlands resource base continuing to disappear, comprehensive resource planning is essential for laying the foundation to coordinate permitting programs and to save these resources. We need to focus our efforts in that direction, rather than to continue to litigate over what qualifies as a wetland. This Court can provide much-needed clarity and confirm that isolated wetlands are included so that we can get on with the important work of protecting these resources and fulfilling the "no net loss" goal.

Since much of the wetlands litigation in recent years has focused on what does, or does not, qualify as "navigable waters" and "waters of the United States" under the CWA,[25] it is fair to say that both the private and public sectors would benefit from some much-needed clarity in defining what qualifies as jurisdictional waters, particularly for non-navigable tributaries, such as ephemeral

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planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005]. Replacement of existing wetlands should be considered only after avoidance and minimization of wetland impacts and only where the wetland function in-kind can be replaced within the same sub-watershed.

[25] *See, Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001). The following cases have taken a very broad view of what a tributary is, tracing the tributary far upstream: *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), and *United States v. Buday*, 138 F. Supp.2d 182 (D. Mont. 2001). Other courts have taken a more narrow view. *See, Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *United States v. Newdunn Associates*, 195 F. Supp.2d 751 (E.D. Va. 2002).

(seasonal) and intermittent streams, and small water segments located great distances from navigable waters.

Petitioners urge this Court to bring clarity by establishing a strict nexus requirement[27] which would have the practical effect of removing many thousands of acres from federal protection. The American Planning Association believes both clarity and the goal of "no net loss" can be achieved by affirming a broad definition of "waters of the United States" which encompasses non-navigable, isolated wetlands. Indeed, it is difficult to imagine how the President's goal of restoring, improving, and protecting the quality and quantity of three million acres of wetlands by 2009 can be achieved without acknowledging the importance of isolated wetlands in meeting that goal.[28]

When isolated wetland resources are identified, categorized and mapped, property owners and regulatory agencies are often able to move beyond the contentious stage where one party is asserting jurisdiction, while the other is hoping to escape regulatory oversight because property owners have greater certainty about how their property can, and cannot, be developed. Early evaluation of potential wetlands is the best way to avoid surprises that can derail a project. Likewise, regulatory agencies have greater clarity about which wetlands they need to focus their attention, staff and fiscal resources on – hopefully resulting in

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[27] Pet. Brief at 34.

[28] On Earth Day 2004, President Bush celebrated the opportunity to move beyond the federal policy of "no net loss" of wetlands and called for a new commitment to attain an overall increase in the quality and quantity of wetlands in America. *Available at* http://www.coastalamerica.gov/News_ release_final.pdf.

more conservation planning with broad public involvement and support.

The private and public sectors can then jointly explore creative solutions to accomplish both development and wetland protection. Encompassing non-navigable and isolated wetlands within the "waters of the United States" will not wipe-out development potential for property owners of such resources because there are many regulatory tools and options available to maximize development potential on such property while protecting the clearly identified wetland resources.

III. Planning And Land Use Regulatory Tools Provide A Range Of Options For Wetland Protection

In most cases, avoiding wetlands is the preferable option for both the property owner and the government. This option is enhanced when wetlands are clearly delineated and mapped. Public-private partnerships to improve wetlands management, which incorporate private stewardship and federal, state and local cooperation, is desirable and feasible. Such a partnership approach to wetlands management can be more flexible in achieving goals than just through reliance on governmental agencies. Partnership arrangements have the potential for developing a broad base of citizen support for wetlands management. By adopting zoning and/or development performance standards for wetlands and adjacent lands, local government can achieve comprehensive wetlands protection that, in many cases, may obviate the need for federal or state permits.

There are a multitude of regulatory tools and options available to the states, local governments, planners and property owners to protect wetlands. Since most wetlands are privately owned, private incentive programs are essential. The Food Security Act of 1985[29] contains a number of incentive programs that foster wetland conservation. These programs have been highly successful in protecting wetlands and should be expanded. The Wetlands Reserve Program[30] (WRP) is a voluntary program offering landowners the opportunity to protect, restore, and enhance wetlands on their property. The USDA Natural Resources Conservation Service (NRCS) provides technical and financial support to help landowners with their wetland restoration efforts. The NRCS goal is to achieve the greatest wetland functions and values, along with optimum wildlife habitat, on every acre enrolled in the program. This program offers landowners an opportunity to establish long-term conservation and wildlife practices and protection.[31]

The American Planning Association believes that the Section 404 protection should be augmented by state legislation and local ordinances, as appropriate, to regulate human-controlled activities which cause adverse impacts to wetlands; to provide protection for isolated wetlands; to strengthen the biological component of the permitting process by recognizing the value of wetlands for wildlife habitat; and to provide incentives to encourage landowners to protect existing wetlands. Local government's role in

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[29] 16 U.S.C. §§ 3801-3862.

[30] 16 U.S.C. §§ 3837-3837f.

[31] *Available at* http://www.nrcs.usda.gov/programs/wrp/ – USDA, Natural Resources Conservation Service.

the federal permit decision-making process needs to be legitimized and federal law should provide the option for local protection to exceed that which is required by federal statutes.[32]

A sound public planning process, along with the adoption of resource conservation plans, should logically precede preparation of regulations. State, regional and local planning activities are important precursors to drafting and implementing effective regulations. Fortunately, a number of innovative land use planning tools have become widely authorized and used around the country to effectively protect isolated and non-navigable wetlands once those resources have been identified and mapped.[33] The days of Euclidean zoning are rapidly fading.[34]

Professor John R. Nolon explains it this way:

> Why the natural landscape tends to be "fractured" is explained, largely, by Euclidean zoning. The layout of zoning districts very seldom has much to do with the topography or boundaries of natural resources. The lines one would draw, for example, to protect a vernal pool habitat or a watershed area would bear little relationship to the development blueprint of the municipal government found in its zoning district map. As important, local zoning

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[32] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[33] *See, e.g.*, McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004.

[34] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> often fails to create cost-effective development zones where developers are encouraged to build, where review processes are streamlined, and where infrastructure investments are concentrated.[35]

Planning professionals are taking Ian McHarg's lessons to heart, recognizing that it is critical to have "good" information as the basis for planning and subsequent regulations.[36] Many familiar land use tools (*eg.*, subdivision and zoning) have been refashioned to address the new challenges that communities face with growth and development today; when combined with the appropriate biological and ecological information, these tools can be used to protect and conserve isolated wetlands, while redirecting development to appropriate locations.

A few of these land use tools include:

* Transfer of Development Rights (TDRs) – Development potential can be transferred from one area to another (known as sending and receiving zones) so that property owners in the sending area are compensated for not developing, while development in receiving zones is encouraged. The Long Island Pine Barrens Act of 1993 utilized TDRs, among other things, to protect lands mapped in the Core Preservation Area and transferred that development potential to lands in the Compatible

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[35] Nolon, John R., FLEXIBILITY IN THE LAW: THE RE-ENGINEERING OF ZONING TO PREVENT FRAGMENTED LANDSCAPES, New York Law Journal, February 18, 1998. *Available at* http://www.law.pace.edu/landuse/reengine.html.

[36] McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004, Chapter 3.

Growth Area.[37] On a regional scale, isolated wetlands could be mapped within sending zones if the community or state had a TDR program in place.

* Purchase of Development Rights (PDR) – Very similar in concept to the TDR but instead of transferring development potential from the property to be protected, the development potential is purchased outright.[38] If the government or a land trust wants to purchase the development rights, an independent appraisal is completed to determine the value of the development rights and, upon agreement, a permanent easement is recorded and the development rights are held in perpetuity.

* Wetland Protection Ordinances – Local wetland protection ordinances can require design review, review of grading and building permits, and limit grading and other land disturbance on the wetlands. Local governments can also protect wetlands by locating their infrastructure projects, such as sewage facilities, outside of such areas. Steep slope ordinances prevent grading on hillsides in order to avoid the drainage and run-off into the wetlands. The village of Schaumburg, Illinois, as an example, adopted such a wetland protection overlay district as an amendment to its zoning ordinance.[39]

* Cluster development zoning – Isolated wetlands are often located in the path of new residential subdivisions.

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[37] *Id.* at 87-91, *See also*, Pruetz, Rick, BEYOND TAKINGS AND GIVINGS – SAVING NATURAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS AND DENSITY TRANSFER CHARGES, Arje Press, 2003.

[38] McElfish at 91-95.

[39] McElfish at 118-125.

Rather than scatter new housing units on large, equally-sized lots throughout the subdivision, a community might require the applicant to cluster the same number of housing units closer together on a portion of the property, leaving the remaining acreage undeveloped in its natural state. Calvert County, Maryland adopted such an ordinance in 1993, requiring all subdivisions larger than 20 acres to cluster. Clustering is voluntary on parcels less than 20 acres.[40]

* Floating zones – A floating zone defines a use, such as an office complex, research laboratory, or multifamily housing, that the community wants to encourage. The floating zone ordinance contains a number of provisions intended to mitigate the impact of the development on the surrounding area, including wetlands. Normally for a parcel to be eligible for rezoning under a floating zone, it must be of a sufficient size to insure that the development can be fitted properly into its surroundings.[41]

* Wetland mitigation banking – "In some communities, wetland mitigation banking may be a profitable use for wetland parcels. A wetland mitigation bank is a location that is available to satisfy a requirement under a Section 404 permit for off-site compensatory mitigation. The bank generally is a restored or enhanced wetland (previously degraded in some manner). The developer of a wetland mitigation bank sells credits; purchasers of credits are other persons who are allowed by a Section 404 permit to

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[40] McElfish at 51-55.

[41] Nolon, *supra* note 36.

fill their wetlands if they perform mitigation elsewhere. The mitigation banks can sell credits on the open market."[42]

* Subdivision Regulations – Lot-averaging is "a technique that allows flexibility in lot size and subdivision design while maintaining a desired density. Under lot averaging, the resulting lots may be different sizes and shapes – thus facilitating the protection of natural features – while maintaining a prescribed average density of development."[43] Subdivision regulations can require setbacks of buildings, not only from the lot line but from ecological resources such as wetlands.[44]

* Incentive zoning – Incentive zoning can be used to encourage development in appropriate areas away, for example, from wetlands and other vulnerable resource areas and concentrate development in other districts where it can be properly serviced. In setting up such a system, the existing zoning is left in place, but more intensive development is permitted in exchange for certain community benefits.[45]

Isolated, non-navigable wetlands are facing continued pressure from development and piecemeal efforts to protect these resources. Acknowledging that these wetlands exist, that they require protection, and that the appropriate land use tools are available, will be consistent with our nation's goal of "no net loss."

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[42] Strand, Margaret N. and Lowell Rothschild, *Wetland Basics in the Twenty-First Century*, LAND USE LAW & ZONING DIGEST, Vol. 55, No. 10, American Planning Association, October 2003, at 3-13.

[43] McElfish at 78-79.

[44] *Id.*

[45] Nolon, *supra* note 35.

CONCLUSION

The land use tools exist to address wetland protection in a meaningful way to benefit both the public and the property owner. Isolated, non-navigable wetlands have important ecological functions and benefits which must be preserved and protected. This can only be accomplished if "the waters of the United States" is broadly interpreted.

The American Planning Association urges the Court to acknowledge that isolated wetlands are important wetland resources that require protection under Section 404 that, coupled with the use of appropriate and available land use tools, can help ensure that the nation achieves its long-standing goal of "no net loss."

Respectfully submitted,

NANCY STROUD*
LEWIS, STROUD & DEUTSCH, L.P.
1900 Glades Road, Suite 251
Boca Raton, FL 33431
(561) 826-2800

LORA A. LUCERO, AICP
122 S. Michigan Avenue
Suite 1600
Chicago, IL 60603
(505) 247-0844

*Counsel of Record for Amicus Curiae
American Planning Association*

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Supreme Court of the United States

RAPANOS, ET AL.,

Petitioners,

v.

U. S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

CARABELL, ET AL.,

Petitioners,

v.

U. S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF AMERICAN RIVERS, ENVIRONMENTAL DEFENSE, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, PHYSICIANS FOR SOCIAL RESPONSIBILITY, SIERRA CLUB, TIP OF THE MITT WATERSHED COUNCIL, AND WATERKEEPER ALLIANCE IN SUPPORT OF RESPONDENTS

HOWARD I. FOX
EARTHJUSTICE
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for *Amici Curiae* American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance

January 13, 2006

RULE 29.6 STATEMENT

American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance are nonprofit corporations. They have no parent corporations and none are publicly held.

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STATEMENT OF INTEREST

American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance ("Environmental Amici") all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members and supporters who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

INTRODUCTION

At issue is the geographic scope of the Clean Water Act's core safeguard—the requirement to obtain a permit before discharging pollutants to "waters of the United States." § 502(7). In their quest to exempt their discharges from that safeguard, Petitioners and their *amici* rely heavily on *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), which they

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

interpret as conditioning permit jurisdiction on a "significant nexus" to traditionally navigable waters. While Environmental Amici submit that neither *SWANCC* nor the Act establishes such a nexus requirement, the Court need not address that issue here. Unlike the "isolated" waters at issue in *SWANCC*, *see* 531 U.S. at 171, these cases involve wetlands adjoining tributaries of the Great Lakes. As this brief will show, the Corps of Engineers' regulations properly apply the Act's permit requirements to tributaries of traditionally navigable waters (Part I, *infra*), as well as wetlands adjacent to such tributaries (Part II, *infra*).

Initially, while the specific discharges at issue here are governed by the Act's § 404 permit program, it bears emphasis that the interpretational issue posed here goes well beyond § 404. Specifically, both the § 404 authority to grant permits for discharges of dredged or fill material, and the § 402 permit program for discharges of all other pollutants, only come into play if a discharge is otherwise prohibited under § 301.

The § 301 prohibition does not apply, and no Clean Water Act discharge permit is required in the first place, unless there is a "discharge of any pollutant." § 301(a). Significantly, the Act defines "discharge of a pollutant" as *inter alia* the addition of any pollutant to "navigable waters" from any point source. § 502(12). The Act in turn defines "navigable waters" as *inter alia* "the waters of the United States." § 502(7).

Thus, if a given water is not among "the waters of the United States," the § 301(a) discharge prohibition does not apply, and—with very few exceptions[2]—that water can

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[2] In the case of oil or hazardous substances, the Act bars not only discharges of those pollutants into navigable waters, but

(... footnote continued next page)

suffer discharges of any type of pollutant whatsoever without any Clean Water Act permit. Thus, these cases pose the question whether the Clean Water Act regulates any discharges into the great majority of this country's tributaries and adjacent wetlands—involving not just discharges of dredged or fill material, but also discharges of sewage, sediment and toxic chemicals such as cyanide from factories.[3]

Moreover, the Act grants states authority they would not otherwise have to control discharges in connection with other federal licenses (such as hydroelectric licenses)—even when no pollutant is discharged. *See* § 401. Because those safeguards apply only to discharges "into the navigable waters," § 401(a)(1), a crabbed reading of the § 502(7) definition would work serious harm on this key Clean Water Act program as well.

Under Rapanos's theory (Br. 9), the only rivers and streams protected by the Act would be "traditional navigable waters" (*i.e.*, the same water bodies regulated by Section 10 of the Rivers and Harbors Act of 1899), and tributaries directly abutting those waters. In Michigan, just 496 miles out of 54,300 miles of rivers and streams—or 0.9%—are traditionally navigable. Memo from Diana Klemans, Michigan Department of Environmental Quality (Jan. 10, 2006).[4] Under Rapanos's theory, the bedrock interpretation

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(... footnote continued from previous page)
also discharges affecting maritime or federal resources. § 311(b)(3), § 33 U.S.C. 1321(b)(3).

[3] *See* www.earthjustice.org/brief/Region_1.pdf (comments by EPA Region I, at 9-12); www.earthjustice.org/brief/R3J.pdf (comments by EPA Region III, Appendix J)

[4] *See* www.earthjustice.org/brief/MichMemo.pdf.

prevalent since 1972 would be reversed, and the overwhelming majority of the hundreds of thousands of permits issued to sewage treatment plants, factories and dredge and fill operations since that date would have been unnecessary.

SUMMARY OF ARGUMENT

To accept Petitioners' argument that tributaries of larger waterways are excluded from the Act's protections, the Court would have to conclude that the 1972 authors of the Clean Water Act intended to dramatically cut back on the preexisting geographic scope of water pollution law. In language dating back to the McKinley Administration, the predecessor statute already covered discharges into tributaries. The notion that Congress intended the 1972 Act to cut back on law from the previous century is untenable.

As this Court has recognized, the 1972 Act's authors considered the predecessor legislation to be "inadequate in every vital aspect," and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (citation omitted). Thus, the Act "applies to all point sources and virtually all bodies of water." *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

Petitioners' theory would also undermine two key preemption holdings of this Court. *Milwaukee* and *Ouellette* expressly relied on the Act's comprehensive scope in holding that the Act preempted the common law of downstream states as well as federal common law. Were the Court to hold that tributaries and adjacent wetlands are outside the Act's safeguards, the Act would be anything but "comprehensive" and "all-encompassing," but instead would apply only to a tiny fraction of the Nation's waters. Under that scenario, the rationale underlying *Milwaukee* and *Ouellette* would no

longer be viable, and the common law remedies preempted by those precedents would spring back to life.

Once the error is recognized in Petitioners' attempt to exclude tributaries, their corresponding attempt to exclude wetlands adjacent to those tributaries must likewise be rejected. This Court long ago recognized that Congress intended the Corps' jurisdiction to "extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction." *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 138 (1985) (emphasis added).

The agencies acted reasonably in applying the Act's safeguards categorically to tributaries and wetlands. That categorical coverage does not halt meritorious projects, but on the contrary allows them to go forward through issuance of discharge permits. *See Bayview*, 474 U.S. at 135 n.9.

The legislative history shows that Congress intended the Act to extend to tributaries, in order to protect traditional navigable waterbodies from pollution flowing downstream and to avoid unequal regulatory approaches that would give upstream dischargers an unfair advantage over their downstream competitors. Petitioners' effort to subject the Act to radical surgery would undermine these objectives, as well as economic interests expressly protected by the Act, including public water supplies and fisheries. This Court's precedent has recognized all these goals as legitimate grounds for exercise of Congress's Commerce Clause power.

ARGUMENT

I. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT TRIBUTARIES OF TRADITIONALLY NAVIGABLE WATERS.

A. Coverage of Tributaries Is Consistent With—Indeed, Required By—the Act.

The Corps' longstanding permit regulations (like EPA's) expressly encompass tributaries of traditionally navigable waters. 33 C.F.R. § 328.3(a)(5). Petitioners have shown neither that this regulation contravenes clearly expressed congressional intent under Step One of *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984), nor that it is an unreasonable interpretation under Step Two. *Id.* 844.

1972 Amendments. The 1972 Congress deliberately extended the Act's protections to "the waters of the United States," § 502(7), and did not base the key definition on "the navigable waters of the United States" as initial versions would have done. *See* Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973), at 1698 (emphasis added). Preexisting water pollution law provides key context for Congress's pointed omission of the word "navigable" from § 502(7).

Specifically, the Act's core permit program—the § 402 National Pollutant Discharge Elimination System program—was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides *inter alia* that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would be issued. § 402(a)(4) and (5).

Tellingly, the Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary,

it encompasses discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407 (emphasis added).

Thus, to conclude that tributaries of traditionally navigable waters are exempt, one would have to believe that the 1972 Congress cut back the geographic scope of the predecessor statute. Indeed, the cutback would be dramatic. In the Missouri River watershed, for example, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only 3,151 miles—less than 1%. L. Wood, Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 Envtl. L. Rptr. 10187, 10193 n.32 (2004).

The notion that Congress intended any such cutback is untenable. To the contrary, faced with rivers literally catching fire due to pollution, *see U.S. v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974), the 1972 Congress concluded that "the previous legislation was 'inadequate in every vital aspect'"—and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (citation omitted). Indeed, the Clean Water Act "applies to all point sources and virtually all bodies of water." *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Rapanos's claim would instead dramatically shrink federal water pollution permitting back to a narrow geographic scope not seen since the McKinley Administration.

EPA's contemporaneous interpretation. Given this background, it is not surprising that the very first agency

regulation defining the scope of covered waters encompassed not only "[a]ll navigable waters of the United States," but also "[t]ributaries" of those waters. 38 Fed. Reg. 13529 (May 22, 1973). This 1973 regulation was issued by EPA, the agency primarily responsible for implementing the Act, and it pre-dated the Corps' initial, narrower 1974 regulation. *See* 39 Fed. Reg. 12115 (April 3, 1974). Likewise, EPA's 1973 definition was issued two years before a federal district court overturned the 1974 Corps regulation, *see NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), and thus was not prompted by court order.

"[T]his Court will normally accord particular deference to an agency interpretation of longstanding duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (citation omitted). Indeed, such deference "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933) (emphasis added).

1977 Amendments. The 1977 Amendments further confirm the inclusion of tributaries. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Act (and by the Refuse Act). Under the proposed narrowing language, the permitting safeguards of those statutes would have encompassed only traditionally navigable waters, together with wetlands that were both "contiguous or adjacent" to such waters and "periodically inundated." *See, e.g.*, Legislative History of the Clean Water Act of 1977 (October 1978), at 901. However, though such language was passed by the House, the Senate—and ultimately Congress as a whole—rejected it. *Bayview*, 474 U.S. at 136-37.

In congressional hearings, the Department of Justice sharply criticized the proposed limiting language. It was

"crystal clear," the Department noted, that the Refuse Act "by express statutory language reaches pollution in non-navigable tributaries of navigable waters." Section 404 of the FWPCA of 1972, Hearings before the Senate Committee on Public Works, Serial No. 94-H49 (July 27, 1976), at 108 (statement of Assistant Attorney General Peter Taft).[5] The proposed amendment cutting back that coverage "is highly objectional [sic] and could serve to undermine the whole national effort under the Federal Water Pollution Control Act and the 1899 Rivers and Harbors Act to protect our waters from toxic and harmful substances." *Id.* 122 (emphasis in original).

Under that language, the Justice Department noted, "we could not have brought the 456 counts in an indictment under the Refuse Act against Allied Chemical for its discharges of Kepone and other toxics between July 1971 and October 1972 into the nonnavigable Gravelly Run flowing into the James River." *Id.* Likewise, under the proposed language, "an earth-fill dam could now be built across a major tributary supplying much of the water flow to a navigable river, cutting off that flow. Since such an activity would involve a discharge of fill material into a 'non-navigable' water under [the proposed language], it would be exempt." *Id.* 123. In sum, the proposed language was "a direct attack upon the general ability of the United States to protect its public waters and would send us back to the last century." *Id.* 124.

By the time the proposed limiting language reached the Senate floor, such criticisms had placed its supporters on the defensive. The sponsor of that language—Senator Bentsen—noted that an opponent "was calling news organizations throughout Washington yesterday and advising them that this legislation would permit toxic discharges into smaller, non-navigable, waterways." 1977 Legislative History at 905.

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[5] *See* www.earthjustice.org/brief/DOJ1976.pdf.

According to Senator Bentsen, "[n]othing could be further from the truth." *Id.* Likewise, responding to a newspaper editorial warning that "[t]he dumping of toxic spoil in a creek, for instance, can poison water supplies miles downstream," *id.*, Senator Bentsen protested that "we do not propose to change the law and permit any relaxation of our efforts to clamp down on the dumping of sewage or 'toxic spoil' or any other toxic discharges in even the smallest creek in this Nation." *Id.* 906. *Accord, id.* 939 (Sen. Dole: "The argument has been made that the Bentsen amendment would allow the dumping of toxic substances into a stream such as that found in Rock Creek Park. That simply is not true.").

Notwithstanding Senator Bentsen's reassurances, opponents of his amendment argued that it would allow toxic discharges into tributaries. For example, Senator Hart argued that under the amendment, "substances such as mercury and cadmium, PCBs, arsenic, oil, and grease, which are contained in much of the dredged material of this country, could be dumped into the waterways and wetlands as a result of the dredging activity." *Id.* 909. For example, "if the tributaries of the James River contain Kepone in their sediment, we could have, under this program, a situation where those tributaries would be dredged and that dredged spoil could be deposited back to the waterways or into the adjacent wetlands releasing that toxic material into those waterways." *Id.* Indeed, Senator Hart indicated that the amendment "will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted." *Id. See also id.* 911 (Sen. Stafford), 929-30 (Sen. Muskie), 916-19 (Sen. Chafee).

Likewise, Senator Baker emphasized that "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on

nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors." *Id.* 920.

Thus, in debating the unsuccessful attempt to narrow the Act's geographic scope, neither side expressed support for the result Rapanos urges here: open season to dump toxic pollutants into tributaries of traditionally navigable waters. Even the brief of the Solid Waste Agency in *SWANCC* disclaimed any such argument. To the contrary, the Agency argued that critics of the proposed 1977 narrowing amendment "successfully advocated retaining the limits of the 1972 Act to protect the '[f]ederal interest in waterways other than those on which a ship can be floated,' including 'small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country.'" Reply Brief of SWANCC, 2000 WL 1532361 (Oct. 13, 2000), at 14-15 (quoting Sen. Hart). Instead of limiting the 1972 Act's geographic scope, "Congress adopted a compromise" that allowed certain activities to go forward either without a permit (§ 404(f)) or with a general permit (§ 404(e)). Opening Brief of SWANCC, 2000 WL 1041190 (July 27, 2000), at 25-26.

Likewise significant is another feature of that compromise. The 1977 Amendments authorize delegation of the § 404 program to states, but only as to waters "other than" traditionally navigable waters and adjacent wetlands. § 404(g)(1). If § 404 applied only to traditionally navigable waters and adjacent wetlands, the "other" waters referenced by § 404(g)(1) would be an empty set. A reading that renders Congress's carefully crafted delegation provisions a dead letter would violate fundamental principles of statutory interpretation. *See TRW v. Andrews*, 534 U.S. 19, 31 (2001). Thus, in *SWANCC* this Court recognized that it is plausible to read § 404(g)(1)'s reference to "other" waters as

encompassing "nonnavigable tributaries and streams." 531 U.S. at 171.

1987 and 2000 Amendments. In amendments enacted in 1987 and 2000, Congress made clear its intent that Clean Water Act permit requirements apply to two key categories of discharges: separate storm sewer discharges (§ 402(p)) and combined sewer overflow discharges (§ 402(q)). These largely urban systems include large numbers of discharge points, many of them on small tributary streams.

Appendix A includes photographs of examples in the District of Columbia, including an outfall into Piney Branch and two outfalls into Soapstone Creek. Hundreds of outfalls line the District's small streams, which flow into the Potomac River—either directly or via other tributaries.[6] The pictured outfalls—like many thousands of others around the Nation—are covered by NPDES permits.[7] Indeed, violations of one of those permits led to a consent decree that will require reductions in raw sewage discharges from the Piney Branch CSO outfall.[8] Yet under Rapanos's theory, these outfalls would not be required to have Clean Water Act permits at all, and would be free to continue uncontrolled discharge of raw

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[6] Storm Water Management Plan (D.C. Oct. 19, 2002), Table 3.2-1, *see* www.earthjustice.org/brief/DCStorm Excerpt.pdf.

[7] www.epa.gov/reg3wapd/npdes/pdf/DC_MS4_Permit_CAD-5-04.pdf; www.epa.gov/reg3wapd/npdes/Blue_Plains_Permit_Final.pdf.

[8] Consent Decree in *U.S. v. D.C. Water and Sewer Auth.*, D.D.C. 00cv183 TFH (entered Mar. 23, 2005), at 20-21.

sewage and a variety of other pollutants that would harm both the tributaries and larger downstream waters.[9]

Statutory context and purpose. Statutes are to be read in a "holistic" manner, *Koons Buick Pontiac GMC v. Nigh*, 125 S. Ct. 460, 466-67 (2004), viewing individual provisions "in their context and with a view to their place in the overall statutory scheme," *Raygor v. Regents of U. of Minnesota*, 534 U.S. 533, 545-46 (2002) (citation and internal quotations omitted), and in light of the Congressional purpose. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statute "could not accomplish its intended objective"); *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (an interpretation that would leave "large gaps in the regulation of occupational health and safety" would be "plainly inconsistent with the purpose of the [Occupational Safety and Health] Act"). These principles further support the Corps' conclusion that the Act's permit safeguards apply to tributaries.

The Act's overarching purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a). In furtherance of that goal, the Act's substantive provisions require establishment and achievement of water quality standards sufficient *inter alia* "to protect the public health or welfare." § 303(c)(2)(A). *See also* 301(b)(1)(C). Section 404 itself expressly safeguards against unacceptable adverse impacts on several enumerated environmental indicators. § 404(c).

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[9] According to EPA's Region III office, stormwater "is responsible for 21 percent of impaired lakes and 45 percent of impaired estuaries in the United States. In addition, in the Mid-Atlantic Region alone, storm water is responsible for 5,265 miles of impaired streams." *See* www.epa.gov/reg3wapd/stormwater/index.htm.

Pollutant discharge into tributaries works against these provisions by *inter alia* harming water quality in traditionally navigable waters downstream. If Congress's "authority to control pollution was limited to the bed of the navigable stream itself," "[t]he tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste." *Ashland*, 504 F.2d at 1326.

Beyond the harms caused when pollutants are transported from tributaries into larger waters downstream, discharges into tributaries work against the statute by harming the tributaries themselves.

First, altered hydrology caused by discharges of pollutants affects the flow of water from upstream tributaries into the traditionally navigable waters—increasing the flow so as to cause flooding, or reducing it so as to shrink the downstream waterway. Indeed, § 404 embodies special concern about such effects. While offering a conditional exemption for certain agricultural and silvicultural activities, § 404 provides that the exemption does not apply—and a permit is required—"where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." § 404(f)(2).

Second, discharge of pollutants can harm fish species in tributaries, which spend part of their life cycle in larger waters downstream. For example, anadromous salmon spawn far upstream, often in tiny streams "small enough to step across," and that are dry part of the year. Jonathan Lyman, *Alaska's Wild Salmon* (Alaska Dept. of Fish & Game 2002), at 22. In the eastern United States, anadromous fish that venture far upstream include herring, a widely distributed fish found in small streams five feet across. Tom Horton, *Bay Country* (Johns Hopkins Press 1987), at 41.

Likewise, catadromous American eels—a commercial species supporting a multimillion dollar fishery in the Chesapeake Bay and along the Atlantic coast—spend much of their life upstream in tiny tributaries, then travel downstream to spawn in the Atlantic Ocean. *Id.* 51-52. Eels "live in nearly every stream in the eastern United States." Cheryl Dybas, "By the Dark of the Moon, Eels Slither Out to the Sea," *Washington Post* (Oct. 9, 1996), at H1 (quoting fisheries scientist). In the District of Columbia, eels have been found in small streams—including Piney Branch,[10] which has numerous outfalls that would not require Clean Water Act permits under Rapanos's theory.[11]

Protection of fisheries is a central feature of the Act, appearing not only in its general purposes statement, § 101(a)(2), but also in its substantive provisions. For example, water quality standards must account for "propagation of fish and wildlife," § 303(c)(2)(A), and § 404 itself safeguards against discharges that unacceptably harm "shellfish beds and fishery areas (including spawning and breeding areas)." § 404(c) (emphasis added).

Third, both the Act's water quality standards provision and § 404 itself provide for protection of public water supplies. §§ 303(c)(2)(A) ("public water supplies"), 404(c) ("municipal water supplies"). In the mid-Atlantic states alone, "between 148 and 526 surface drinking water intakes, serving populations ranging from 535,000 to 3 million people are potentially affected should first and second order streams

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[10] *See* Rock Creek Fisheries Study, prepared for National Park Service (Nov. 5, 1993), at 51, *see* www.earthjustice.org/brief/RockCreekExcerpt.pdf.

[11] *See* D.C. Storm Water Management Plan, *supra* n.6, at Table 3.2-1.

be removed from Clean Water Act jurisdiction." Comments by EPA Region III (May 2003), at 26.[12] Removal of Clean Water Act protection "will likely increase risks to human health and require additional infrastructure expenditures by public utilities using surface water intakes." *Id.*

B. Exclusion of Tributaries Would Contravene This Court's Settled Precedent, and Would Revive Common Law Causes of Action that This Court Has Held Preempted.

This Court's precedent further confirms the Corps' conclusion that the Act's coverage extends to tributaries. As indicated above, *Ouellette* held that the Act "applies to all point sources and virtually all bodies of water," 479 U.S. at 492, and *Milwaukee* emphasized that the 1972 Act was a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." 451 U.S. at 317-19. These rulings refute the interpretation advanced by Rapanos and his allies, under which the Act's permit programs would extend only to a tiny fraction of the nation's waters.

These rulings were holdings, not dicta. *Ouellette*'s holding concerning the breadth of waters covered by the Act was integral to the Court's conclusion that the Act preempted downstream-state common law. While recognizing that courts should not "lightly infer" preemption, *Ouellette* found that preemption "may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." 479 U.S. at 491 (citation and internal quotations omitted). The Court went on to cite the Act's broad geographic coverage as a key basis for concluding that

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[12] www.earthjustice.org/brief/R3.pdf.

its regulatory scope was "pervasive," and that "the only state suits that remain available are those specifically preserved by the Act." *Id.* 492.

Likewise in *Milwaukee*, the Court's characterization of the Act's regulatory program as "comprehensive" and "all-encompassing" (451 U.S. at 317-19) was integral to its conclusion that the Act preempted federal common law. According to the Court itself, the Act's comprehensive scope was "quite relevant" to the preemption question. *Id.* 319 n.14.

This Court has emphasized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation." *Shepard v. U.S.*, 125 S. Ct. 1254, 1261 (2005) (citation and internal quotations omitted). The holdings of *Ouellette* and *Milwaukee* are just as entitled to that respect as *SWANCC*, which neither expressly nor implicitly overruled those two decisions. Indeed, it is unlikely that Chief Justice Rehnquist intended his opinion for the Court in *SWANCC* to overturn prior decisions that he had authored (*Milwaukee*) and joined (*Ouellette*).

In *Shepard*, the Court found that "time ha[d] enhanced even the usual precedential force" of a prior decision, because "nearly 15 years hav[e] passed since [the decision] came down, without any action by Congress to modify" the decision. 125 S. Ct. at 1261. Here, an even longer time has passed without Congressional action repudiating or even questioning the holdings of *Ouellette* or *Milwaukee* concerning the Act's comprehensive scope. Accordingly, the Court should reject Rapanos's frontal assault on those holdings.

Indeed, were the Court to accept Rapanos's invitation to revisit *Ouellette* and *Milwaukee*, the underlying preemption holdings of those cases would have to be revisited as well, with serious disruptive consequences. If discharges to tributaries do not even require Clean Water Act permits,

application of a neighboring state's common law to such discharges (*e.g.*, of Maryland common law to discharges into a Virginia tributary of the Potomac River) could no longer be said to "circumvent the NPDES permit system." *Ouellette*, 479 U.S. at 494. The specter feared by *Ouellette* could come to pass: "But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the nuisance laws of any of the nine downstream States." *Id.* 496 n.17. Under Rapanos's interpretation, these nine downstream states could indeed pursue nuisance actions against a Minnesota source, simply by taking aim at a source discharging into a Minnesota tributary of the Mississippi.

In *Milwaukee*, this Court ruled that the 1972 Act preempted federal common law. The Court relied on the Act's comprehensive scope to distinguish *Illinois v. Milwaukee*, 406 U.S. 91 (1972), where the Court had recognized federal common law notwithstanding the pre-1972 Act. *See Milwaukee*, 451 U.S. at 318 n.10. By abrogating the 1972 Act's comprehensive scope, Rapanos's theory would erase the preemption holding of *Milwaukee* and revive the federal common law cause of action recognized in *Illinois*.

C. Petitioners' Arguments Offer No Basis for Overturning the Long-Standing Inclusion of Tributaries.

The arguments advanced by Rapanos and his allies offer no basis for overturning the longstanding regulations extending the Act's permit programs to tributaries.

"Remote" tributaries. There is no merit to the suggestion that tributaries should *per se* be excluded from permitting based on mere distance from a traditionally navigable waterway, or on intermittency of flow. Water from a so-called "remote" tributary of a traditionally navigable

waterbody flows downstream into that larger waterbody—or else the upstream tributary would not be a tributary. If the water itself can reach the larger downstream waterbody, then pollutants in the water can do the same. And pollutants entering a traditional navigable waterway from upstream do not magically stop posing a threat to that waterway simply because they traveled a long way to get there, or because the waterway does not flow continuously throughout the year.

Careful scientific analysis has, in fact, shown that many of this country's most significant water quality challenges originate in the discharge of pollutants into very small streams and the loss of wetlands adjacent to them hundreds of miles away.[13]

Thus, "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003) (emphasis added). Moreover, "[p]ollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage." *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997). "Rather, as long as the tributary would flow into the navigable body of water during significant rainfall, it is capable of spreading environmental damage and is thus a water of the United States under the Act." *Id.* (citation and internal quotations omitted). Indeed, as

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[13] *See, e.g.*, Nancy Rabalais, *et al.*, "Beyond science into policy: Gulf of Mexico hypoxia and the Mississippi River," 52 *BioScience* 129, 135 (2002); William Mitsch, *et al.*, "Reducing nitrogen loading to the Gulf of Mexico from the Mississippi River basin: Strategies to counter a persistent ecological problem," 51 *BioScience* 373, 373 (2001).

shown above, pollutants can harm the operation and goals of the Act by causing effects in the tributaries themselves.

Adjacent wetlands. This Court has also recognized that regulation of adjacent wetlands follows from the regulation of tributaries, because even those members of Congress who wished to restrict jurisdiction in 1977 agreed that "whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction." *Bayview*, 474 U.S. at 138. Because the Corps retained jurisdiction over tributaries, it also retains jurisdiction over wetlands adjacent to those tributaries.

Case-by-case showing. Rapanos and his allies also suggest that the applicability of permitting to a given tributary should depend on a case-by-case showing that the discharge causes harm in a traditionally navigable waterway downstream. The argument is baseless.

As this Court has recognized, the relevant inquiry is whether the challenged regulations target a class of waters properly within the statute's reach, not whether each individual water within the class is significant. *See Bayview*, 474 U.S. at 135 n.9 ("If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.") (emphasis added).

Similarly, this Court has recognized the wisdom of a cumulative effects approach. In a case involving a flood control project on a tributary, the Court refused to consider in isolation whether a single reservoir on a single tributary "will effect a substantial reduction in the lower Mississippi floods." *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941). "To say that no one of those projects could be constitutionally authorized because its separate effect on

floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole." *Id.* 527-28.

The effect of pollutants on waters downstream is cumulative, and the Clean Water Act explicitly requires limitation of pollutants to prevent their cumulative downstream impacts.[14] Under the case-by-case approach, therefore, identical streams would be regulated in some watersheds but not others because of the cumulative effects of all potential discharges, and streams would be regulated in some years but not others depending on the likely cumulative discharges within the watershed. This approach would determine whether a particular discharger was covered under the Act by the order he arrived at the stream, rather than the nature of the discharge. Those who had the "good fortune" of polluting a tributary early on—even larger polluters—might be exempt from the Act's protections, whereas those who arrived later would be covered—even if their individual

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[14] Section 404(e) does so explicitly, prohibiting general permits even for small activities if they have more than *de minimis* impacts downstream when measured not just individually but cumulatively. Beyond § 404, the basic permitting program for discharges of pollutants from factories and sewage treatment plants also requires that permits include effluent limits adequate to prevent violations of water quality standards when measured cumulatively, in combination with all other sources of pollutants. *See* § 301(b)(1)(C) (requiring limits to prevent violations of water quality standards); § 302(a) (requiring effluent limitations more stringent than technology based limits to meet water quality goals when a "group of point sources" would otherwise cause violations); § 303(d) (requiring establishment of total maximum daily loads from all sources to attain water quality standards).

discharge was small. There is no support for this approach in the Clean Water Act, and no practical way of accomplishing it since dischargers would have no obligation to inform agencies of the nature of their discharges unless the receiving waters were regulated in the first place.

The Courts have recognized the practical impossibility of this approach. In *Ashland*, the polluter wanted to place the burden on the government to prove, "not merely that oil was discharged into a tributary of a navigable stream, but also that, in fact, the oil reached and polluted the navigable river." 504 F.2d at 1329. The Sixth Circuit rejected this approach: "To state the question is to recognize the impossibility of such proof in many if not all cases. Drops (or barrels) of oil carry no fingerprints. At the juncture of the Pond River and the Green River water analysis which might show oil pollution could not possibly prove which polluter discharged it, in what proportion, or on what occasion." *Id.*

The Corps quite properly avoided these pitfalls by defining tributaries categorically as covered waters, based on the "potential" for harm. *Deaton*, 332 F.3d at 707. Nonetheless, the categorical approach still allows less harmful projects to go forward on a case-by-case basis, through granting of a discharge permit. *See Bayview*, 474 U.S. at 135 n.9.

Manmade streams. Rapanos's allies argue that some of the streams at issue cannot be "waters of the United States" because they should be viewed as ditches, which would fall within the § 502(14) definition of "point source." This argument is untenable.

According to the National Association of Home Builders (Br. 4-5), an item that expressly appears within the point source definition cannot possibly constitute a "water[] of the United States" under § 502(7), and thus is not a "navigable water" under § 404. This approach is a frontal assault on the

longstanding application of Clean Water Act protections to all branches of a tributary system—whether natural or manmade—by which pollutants eventually flow into larger downstream waters. *See, e.g., Deaton*, 332 F.3d at 710-11.

Indeed, by this theory, a very large portion of the rivers and streams in the U.S. would lose their jurisdictional status because they have been transformed into "ditches" and "drains" through rerouting, deepening, straightening, and other alterations. Indeed, the Council on Environmental Quality has estimated that 10% of all perennial streams in the United States have been channelized in this way. Council on Environmental Quality, Environmental Trends (1989) at 35. *See also* Appendix B, infra (map indicating large number of channelized streams in Ohio). Even though the effect and purpose of this channelization is to increase downstream effects by speeding the flow of water and pollutants, by this theory the engineering work would deprive these watercourses, and downstream waters that receive their pollutants, of key water quality safeguards.

Moreover, the purported textual basis for the "ditches" argument will not withstand scrutiny. As the oil industry notes, the "point source" definition includes not only "any...ditch," but also "any...channel." American Petroleum Institute Br. 16-17 (citing § 502(14)). Given their forays across the English Channel, William the Conqueror and General Eisenhower would have been surprised to learn that a channel is *per se* not a navigable water—as would the boat owners who moor their craft in the District of Columbia's Washington Ship Channel.

In addition to the impact on waters, a *per se* exclusion of "ditches" and "drains" (or of natural tributaries, *see* API Br. 16-17) would adversely impact landowners. Many tributary streams—natural ones as well as artificial ones—are not under the control of a single owner, but instead cross

multiple properties before flowing into larger downstream waterbodies. If such multi-owner watercourses were treated as point sources but not as waters of the United States, the "discharge" would occur at the point where the watercourse empties into the larger downstream waterbody. Whoever happens to own the mouth of the ditch or stream would bear the responsibility of obtaining such a permit, and would be held responsible for all pollutants present there—even those originating in upstream properties outside their control. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004) ("a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'").

Treating these watercourses as waters of the United States avoids such problems, while fulfilling the Act's intent to control pollutants "at the source." *See Bayview*, 474 U.S. at 132-33. "Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes." *Eidson*, 108 F.3d at 1342.[15]

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[15] In a variant of the "point source" argument, the Home Builders allege (Br. 8-12) that one of the drains at issue in Carabell has been designated by the County as part of a municipal stormwater system, and therefore must be a point source and not a water of the United States. But the drain at issue long predated the existence of the Act's stormwater permitting program. Record Vol. 1 at 312:21-24 (Robert Leighton testified that the drain on Rapanos' property was built 100 years ago). A preexisting watercourse does not lose its status as a water of the United States simply because a stormwater authority designates it as part of a treatment system. Were it otherwise, adjacent wetlands such as those in *Bayview* could cease being waters of the United States

(... footnote continued next page)

II. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT WETLANDS ADJACENT TO TRIBUTARIES.

Under the longstanding regulations of the Corps (and EPA), waters of the United States encompass not merely tributaries, but wetlands adjacent to them. 33 C.F.R. § 328.3(a)(7). Those same regulations provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c). As in the case of tributaries, Petitioners have shown neither that this regulation contravenes clearly expressed congressional intent under *Chevron* Step One, nor that it is an unreasonable interpretation under Step Two.

Carabell argues (Br. 39-40) that the status of a given adjacent wetland as a water of the United States should depend on a case-specific showing of hydrological connection to the tributary. *Bayview* rejected such an approach. Though "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water," the Court upheld the Corps' decision to define "all" adjacent wetlands as United States waters. 474 U.S. at 135 n.9. "If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* (emphasis added).

Such a conclusion is just as reasonable for the majority of wetlands adjoining tributaries, as for the majority of

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(... footnote continued from previous page)
whenever a municipality designated them as part of a stormwater management and treatment system.

wetlands adjoining traditionally navigable waters. Adjacent wetlands may be connected hydrologically to streams, either receiving water from them, or draining water to them. *See Bayview*, 474 U.S. at 134. Likewise, "adjacent wetlands may serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species." *Id.* 134-35 (citation, internal quotations, and ellipsis omitted).

On their face, Carabell's case-specific allegations concerning the alleged lack of connection between the tributary and the adjacent wetland are unpersuasive. First, Carabell's arguments are invalid as to hydrology. In *Bayview*, this Court explicitly rejected the view that adjacent wetlands could only be regulated if flooded by the river (the view taken by the court below), reasoning that these wetlands may still "tend to drain" into the adjacent body of open water even when they are not flooded. *Id.* 134. As a class, this drainage does not depend on a surface water connection but instead occurs largely through drainage beneath the surface.[16]

Moreover, Carabell has ignored the ecological connections that *Bayview* expressly found relevant. Not only birds, mammals and amphibians, but even commercially valuable fish species can cross obstacles such as berms. For example, "[b]ecause the eel breathes quite nicely through its skin as long as it is moist, it can travel over land some

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[16] *See, e.g.*, Corps of Engineers, EP 1165-2-1, "Digest of Water Resources, Policies, and Authorities," July 30, 1999, at 13-12 (available at http://www.wbdg.org/ccb/ARMYCOE/COEPAM/1165_2_1.pdf) (visited Dec. 29, 2005) ("Other than overtopping, levees principally fail due to one or a combination of four causes: surface erosion, internal erosion (piping), underseepage, and slides within the levee embankment or foundation soils").

distance if there is so much as a heavy dew on the ground. Sometimes, if it cannot climb a dam, it just goes around it." *Bay Country*, *supra*, at 54. Indeed, eels travel "overland to ponds and wells more than a mile from flowing water." *Id.*

In this particular case, Carabell relies heavily on a berm and a clay soil layer that allegedly prevent water exchange between the wetland and the tributary. However, the Carabell record itself shows that there are cuts in the berm. JA Vol. 3 at 639: 16-23 (Wetland Application Hearing, Testimony of Timothy Stoepker). Likewise, it cannot simply be assumed that the clay layer has no gaps whatsoever along its entire length. Nor can it be assumed that the excavation activity associated with Carabell's project will not poke holes in that layer, allowing water to drain underneath the berm,[17] or that it will not alter flow patterns to allow water to overtop the berm. Section 404's permit requirement is expressly designed to address projects "where the flow or circulation of navigable waters may be impaired." § 404(f)(2).

In the end, however, Carabell's case-specific arguments are irrelevant. As *Bayview* confirms, the Corps' regulation validly encompasses adjacent wetlands as a category. "That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." 474 U.S. at 135 n.9.

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[17] *See Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (excavation activity in wetlands poked through impermeable layer, allowing water to drain through).

III. APPLYING PERMIT SAFEGUARDS TO TRIBUTARIES AND THEIR ADJACENT WETLANDS IS WELL WITHIN CONGRESS'S COMMERCE CLAUSE POWER.

Contrary to Petitioners' suggestion, application of the Act's permit safeguards to tributaries and their adjacent wetlands is well within Congress's Commerce Clause power. As shown above, tributary systems have potential to affect traditionally navigable waters by *inter alia* conveying pollutants, reducing or increasing water flow, and impairing fisheries. Indeed, this Court has already "agree[d]" with a Sixth Circuit decision upholding Clean Water Act regulation of tributaries against Commerce Clause challenge. *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 282 (1981), *citing Ashland*, 504 F.2d at 1325.

Moreover, as this Court has emphasized: "Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). That authority "does not depend on a stream's 'navigability,'" and indeed "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved." *Id.* 174.

As the discussion *supra* reveals, Clean Water Act regulation of tributaries and adjacent wetlands derived from a combination of Congressional concerns. They included Congress's recognition that because pollution flows down into navigable waters, it must be regulated "at the source," *see Bayview*, 474 U.S. at 132-33, and its related recognition, as Senator Baker expressed, that "[c]omprehensive

jurisdiction" was necessary to avoid "unfair competition" because otherwise "dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors." 1977 Legislative History at 920. This Court has held that creating minimum, uniform national standards to prevent this kind of destructive competition between states to relax water quality standards is an appropriate justification for Congressional action under the Commerce Clause. *Hodel*, 452 U.S. at 281-82.

While the Clean Water Act considers waters' value for "navigation," § 303(c)(2)(A), it goes well beyond that to also encompass "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." *Id. Accord*, § 404(c) ("municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"). Pursuit of these economic objectives through regulation of tributaries and adjacent wetlands is well within Congress's Commerce Clause power—especially as applied to Petitioners' economic activities.

Assuming *arguendo* there might be some tributaries or adjacent wetlands that do not by themselves affect downstream waters or other interests protected by the Act, that would not defeat Congress's Commerce Clause authority. "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005) (citation and internal quotations omitted). *Accord*, *Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003). Where appropriate, the Corps can allow such activities to proceed by issuing a permit. *See Bayview*, 474 U.S. at 135 n.9.

CONCLUSION

The judgments of the Sixth Circuit should be affirmed.

Respectfully submitted,

HOWARD I. FOX
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for *Amici Curiae* American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance

Outfall located on Piney Branch, a tributary of Rock Creek in the District of Columbia.

View of Piney Branch, downstream of above outfall, showing small size of stream. Fisheries study in early 1990's found catadromous American eels in this stream.

Piney Branch: sign warning of combined sewer overflows into creek.

Outfall discharging into Soapstone Creek, tributary of Broad Branch, which in turn is a tributary of Rock Creek. Outfall is located behind 4411 Connecticut Avenue, NW.

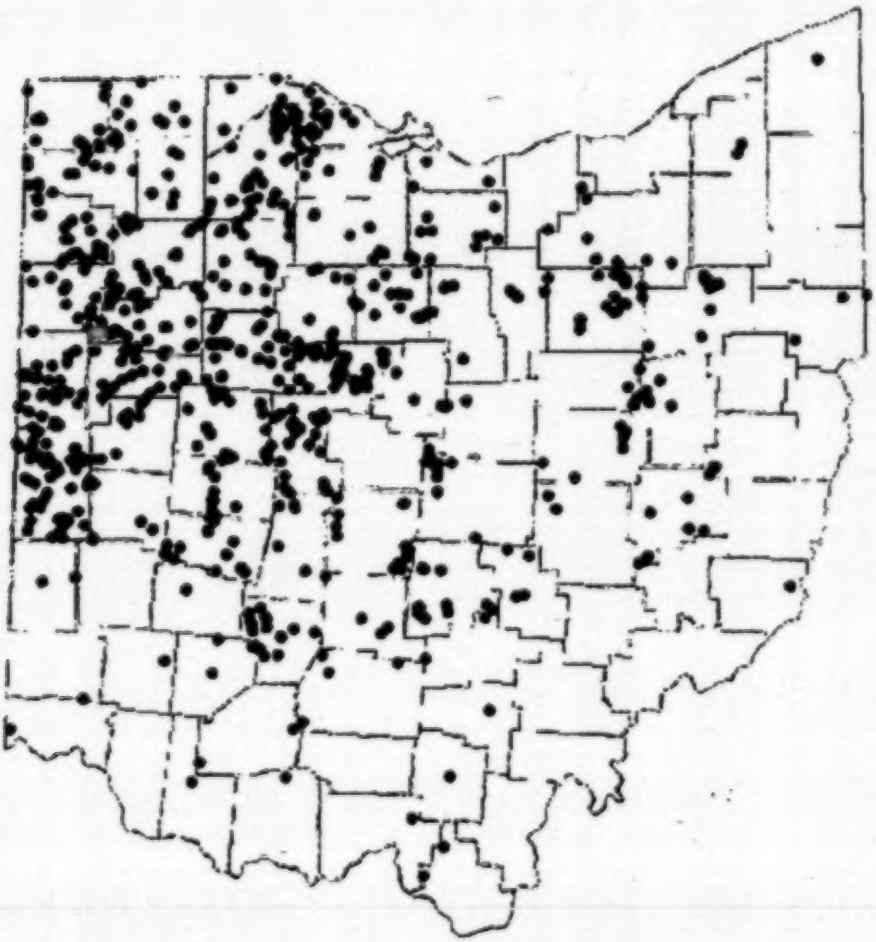
Another view of the outfall discharging into Soapstone Creek behind 4411 Connecticut Avenue, NW. Note also the other outfalls, and the discoloration of the water.

View of Soapstone Creek further downstream, near eastern end of Audubon Terrace, NW, showing another outfall, and small size of stream.

View of Melvin Hazen Branch, a tributary of Rock Creek, showing small size of stream. Fisheries study in early 1990's found a catadromous American eel in this stream.

B-1

The figure below indicates stream locations in Ohio with degraded habitat due to channelization. Each of these channelized streams is effectively a "ditch."



Stream sampling locations in Ohio counties with degraded habitat due to agricultural-related channel modifications. Site characteristics include recent channelization or past channelization with no or limited recovery, low or no stream channel sinuosity and a prevailing row crop or conservation tillage surrounding land use. (Source: Ohio EPA habitat assessment database; 743 sites sampled between 1979 and 2004).

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In The Supreme Court of the United States

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

TIMOTHY J. DOWLING*
DOUGLAS T. KENDALL
JENNIFER BRADLEY
COMMUNITY RIGHTS COUNSEL
1301 Connecticut Ave., NW
Suite 502
Washington, D.C. 20036
(202) 296-6889

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

This brief is the first *amicus* brief ever filed by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). ASIWPCA takes this unprecedented step to emphasize the importance of this case to State protections for vital natural and economic resources.

Founded in 1961, ASIWPCA is a nonpartisan organization for State and Interstate officials who implement surface water protection programs throughout the nation. As the State and Interstate officials with direct, day-to-day responsibility for protecting our nation's waters, we submit this brief to show that continued federal protection of intrastate non-navigable tributaries and their adjacent wetlands is necessary to preserve the effective State-federal partnership to protect our nation's waters established by the Clean Water Act (CWA). ASIWPCA's interest in this case could not be greater.

SUMMARY OF ARGUMENT

1. The stakes in this case are extraordinarily high. The statutory term at issue – "waters of the United States" – is integral not just to the permitting requirements for dredge and fill material, but also to the basic pollution control provisions in section 402 and a host of

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief as reflected in letters filed with the Clerk of the Court.

other critical water quality provisions throughout the Act. If this Court overturns the longstanding federal protections for non-navigable tributaries and adjacent wetlands under the Clean Water Act, the Act would no longer regulate the discharge of sewage, toxic pollutants, and fill into these vital resources, which comprise the large majority of our nation's rivers, streams, and other waters.

Continued federal protection of intrastate non-navigable tributaries and adjacent wetlands is necessary to prevent devastating injury to downstream States, such as pollution and flooding, which would threaten lives and harm economic resources, including our nation's traditional navigable waters.[2] The States are deeply committed to protecting these intrastate resources, but they recognize the compelling national interest in protecting them, and they lack the resources and institutional capacity to do the job alone.

Because virtually every State is a downstream State, an overwhelming consensus exists among the States regarding the need for this continued federal protection. Of particular concern to the States is the inevitable competition for jobs and economic growth that could prevent an upstream State from giving adequate consideration to the harm to downstream States that would result from despoliation of intrastate tributaries.

For example, the State of Montana estimates that for every acre of wetlands destroyed in that State, one million

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[2] Like Respondents and other *amici* supporting Respondents, we use the term "traditional navigable waters" to refer to waters that are used, or susceptible to use, in interstate or foreign commerce.

gallons of water run downstream. Destruction of such wetlands contributes to catastrophic economic losses such as the 1993 flood of the Missouri and Mississippi Rivers. This tragic event killed 70 people, caused more than $10 billion in property damage, and disrupted the use of those rivers as channels of commerce.

So too with pollution. Intrastate tributaries of the Little Blue River in Nebraska, for instance, receive priority protection from federal officials because they play a vital role in preserving the Little Blue as a drinking water source for downstream Kansas communities.

2. Existing State water quality programs depend directly on longstanding federal protections for intrastate non-navigable waters. Invalidation of these established federal protections would pull the rug out from under State officials and leave a regulatory void that the States could not easily fill.

Most States lack independent regulatory programs that would fully protect intrastate wetlands, but instead rely on the longstanding state-certification requirements under section 401 of the Clean Water Act for federally issued permits. This certification authority allows the States to protect valuable natural resources through the federal permit program without undertaking prohibitively expensive administration and enforcement of independent State permitting programs. Excluding wetlands adjacent to intrastate waters from federal protections would strip the States of this longstanding authority to protect these critical resources.

Moreover, the State-federal partnership under the Clean Water Act is not an easily bifurcated pie, but a mosaic of interdependent parts based on deeply rooted

understandings that federal and State officials have reached over 30 years. Invalidation of longstanding federal protections would not promote State prerogatives, but instead subject the States to regulatory chaos and greatly undermine efficient regulatory processes that have arisen over time.

Perhaps most importantly, many States simply lack the resources and institutional capacity to protect intrastate tributaries and their adjacent wetlands if federal protections for these resources were struck down. Even in States with the resources to fill the gap, experience shows that they could suffer devastating losses during the time it would take to enact and implement new State protections.

3. The plain meaning of "waters of the United States" includes waters within our nation's borders regardless of their navigability, a reading compelled by both text and context. Indeed, section 404(g) – which authorizes a State to administer its own permit program for dredge and fill material in lieu of the federal program – would be rendered meaningless if "waters of the United States" were read to exclude intrastate non-navigable waters, including their adjacent wetlands.

The doctrine of severe constitutional doubt does not require a different conclusion. For more than a century, the Court has recognized that Congress's authority over traditional navigable waters encompasses the entire watershed, including non-navigable tributaries. This authority may be used to promote not only navigation, but flood control, water quality, and other values. To protect traditional navigable waters as channels of commerce from the ravages of flooding and pollution, the Congress may safeguard non-navigable intrastate tributaries and adjacent

wetlands as a class, even though individual instances of despoliation might have only a small effect on navigable waters.

ARGUMENT

This brief draws heavily from comments submitted in 2003 by ASIWPCA and the executive departments of more than three-quarters of the States to the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency arguing against modification of the regulatory definition of "waters of the United States" under the Clean Water Act.[3] The comments recognized that in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court invalidated the Migratory Bird Rule as a stand-alone basis for federal jurisdiction under the Act. But *SWANCC* did not address tributaries and adjacent wetlands, and the State comments explained why the Corps and EPA should retain the longstanding federal protections for these waters. In response to these and thousands of other comments, the

[3] The comments were submitted in response to an Advance Notice of Proposed Rulemaking (ANPRM) issued by the Corps and EPA. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003). They reflect the views of the governors, environmental or natural resource protection agencies, or health departments of these States. We cite these comments as "[State name] Comments at **." Full citations for cited comments appear in our Table of Authorities, and a list of the comments from these States urging continued federal protection is set forth in Appendix A. For the Court's convenience, we have assembled copies of these comments at http://www.asiwpca.org/statecomments.htm. As the Court knows, two States (Alaska and Utah) have filed an *amicus* brief in support of Petitioners.

Corps and EPA continue to exercise federal jurisdiction over these waters.[4]

As explained in the State comments and reiterated in this brief, the stakes in this case are extraordinary for two reasons. First, the statutory term at issue – "waters of the United States" – is the jurisdictional lynchpin not only for the requirements regarding dredge and fill material in section 404 of the Act, but also for the Act's basic pollution controls under the "National Pollution Discharge Elimination System" established by section 402 (known as NPDES requirements), State water quality standards under section 303, and several other key statutory provisions.[5] EPA estimates that more than 40 percent of individual NPDES discharges outside Alaska are into headwaters, and that more than 90 percent of drinking water intakes, serving 110 million people, are in headwaters.[6] Reading the Act as covering only traditional navigable waters and adjacent wetlands would eliminate longstanding federal protections for these vital resources.

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[4] For example, the existing regulations continue to define "waters of the United States" to include intrastate waters if their degradation or destruction would harm interstate commerce (*see* 40 C.F.R. § 230.3(s)(3)), as well as wetlands adjacent to intrastate waters. *See id.* § 230.3(s)(7).

[5] *See, e.g.*, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-93 (Jan. 15, 2003) (recognizing that "waters of the United States" defines the regulatory scope of sections 303, 311, 401, 402, and 404).

[6] *See* Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, to Jeanne Christie, Association of State Wetland Managers, at 2 (Jan. 9, 2006) (attached as an Appendix to the Brief of *Amici Curiae* Association of State Wetland Managers, *et al.*, in Support of Respondent United States).

Second, Petitioners' contention that "waters of the United States" includes only traditional navigable waters and adjacent wetlands would eviscerate longstanding federal protections for the large majority of our nation's waters. For example, in the State that gave rise to the cases at bar, traditional navigable rivers and streams cover an estimated 496 miles out of 54,300 total miles of rivers and streams, or less than one percent.[7] Nationally, traditional navigable waters comprise a small fraction of the geographic jurisdiction long recognized by the Corps, EPA, and federal courts.[8]

To be sure, the Clean Water Act must be read to preserve "the primary responsibilities and rights of States" to protect land and water resources. 33 U.S.C. § 1251(b). Petitioners argue that the elimination of federal protections for most of this country's waters is necessary to protect State prerogatives. Rapanos Br. 20-21, 28-31; Carabell Br. 31-33. But, as this very statutory provision indicates, the Clean Water Act preserves the States' primary responsibilities by empowering them to "implement the permit programs," "manage the construction

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[7] Memorandum from Diana Klemans, Chief, Surface Water Assessment Section, Dep't of Envt'l Quality, to Peter Manning, Division Chief, Dep't of Attorney General (Jan. 10, 2006), available at http://www.communityrights.org/michiganmemo.pdf; *see also* Arizona DEQ Comments at 2 (95 percent of Arizona surface waters are ephemeral or intermittent streams); Rhode Island Comments at 1-2 (about 85 percent of total tributary miles in the State are non-navigable).

[8] *See* Lance D. Wood, *Don't Be Misled, CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENVT'L L. REP. 10187, 10187 (2004) (estimating that traditional navigable waters constitute less than one percent of the geographic jurisdiction long recognized by the Corps, EPA, and the courts).

grant programs," and "consult with the Administrator in the exercise of his authority" through the State certification and consultation requirements under the Act, not by limiting the geographical reach of the Act. 33 U.S.C. § 1251(b). As the State officials with frontline responsibility for protecting our nation's waters, we show that these longstanding federal protections are essential to protect vital State interests and preserve the effective State-federal partnership established by the Clean Water Act.

I. The Despoliation of Intrastate Tributaries and Their Adjacent Wetlands Causes Pollution and Flooding in Downriver States, Making it Impossible for States to Solve this National Problem on Their Own.

The issues raised by this case are: (1) whether the Clean Water Act – described by this Court as an "all-encompassing program of water pollution regulation"[9] that protects "virtually all bodies of water"[10] – authorizes the Corps and EPA to protect intrastate tributaries, including their adjacent wetlands; and (2) whether Congress has authority to protect these waters under the Commerce Clause and Necessary and Proper Clause.

Non-navigable rivers, headwater streams, and their adjacent wetlands provide valuable economic and ecological benefits, including direct benefits to traditional navigable waters. Protecting these non-navigable tributaries from toxic discharges is essential to maintaining the ecological integrity of downstream navigable lakes and

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[9] *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

[10] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

rivers. In addition to these obvious benefits, wetlands act as giant sponges to control flooding by storing excess water during heavy rainfall, thereby greatly reducing loss of life and economic damage in surrounding areas.[11] Wetlands also act as nature's "kidneys" by filtering out silt, toxins, and other impurities from polluted runoff before those waters flow into our lakes and rivers.[12] The question here is whether States must protect these resources alone using their police power and other authorities, or whether the federal government has concurrent constitutional and statutory authority.

The States have a pragmatic and important answer to this question. They take seriously their responsibility to protect their natural resources for the benefit of their citizens, with some States supplementing federal protections with unique State protections that, for example, establish buffer zones around streams and wetlands. But at the same time, the States recognize that there is a compelling national interest in protecting intrastate tributaries and their adjacent wetlands, and they know they cannot adequately protect these resources acting

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[11] Wetlands in the continental United States save an estimated $30+ billion in annual repair costs due to flood damage. *See* Lois J. Schiffer and Jeremy D. Heep, *Forests, Wetlands and the Superfund: Three Examples of Environmental Protection Promoting Jobs*, 22 IOWA J. CORP. L. 571, 590 (1997) (citing National Audubon Society, *Valuing Wetlands: The Cost of Destroying America's Wetlands* 24-27 (1994)).

[12] Cities save millions of dollars annually in wastewater treatment costs because wetlands filter out pollutants. *See* Schiffer and Heep, *supra* note 11, at 591 (citing Vicki Monks, *The Beauty of Wetlands*, 34 NATURAL WILDLIFE 20 (1996)); *see also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) ("Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water.").

alone. This concern about the inadequacy of State-by-State regulation is pervasive in the State comments on the ANPRM. *See, e.g.*, Indiana Comments at 2 ("Even if we manage to fill the gaps that would be created by a redefinition of 'Waters of the U.S.' in Indiana, nothing guarantees that all of our nearby states will also fill these gaps."); Vermont Comments at 8 ("Vermont cannot control its own destiny and must rely on effective, uniform regulation at the federal level to manage these out-of-state resources that significantly impact the state's economy."). Texas effectively summarizes this concern:

> Generally speaking, state regulation is an inadequate solution to interstate issues because no matter how comprehensively one state regulates wetlands or water quality, if a neighboring state does nothing or very little, water quality and consequently the public health, environment and economy will be impacted in all the surrounding states and even nationally.

Texas Parks and Wildlife Dep't Comments at 4.

Another concern expressed throughout the State comments is that competition among States for jobs and economic growth might limit their ability to fill any gaps left by a rescission of existing federal protections. *See, e.g.*, Delaware Comments at 14 ("Loss of federal regulation would put environmentally protective states at an economic disadvantage relative to less protective neighbor states, removing the 'level playing field' that now exists and creating pressure for reduced state protection."); Maine Comments at 1 ("[T]he competitive disadvantage this may impose on Maine with respect to other states might lead to pressures to roll-back our own protections."); New York DEC Comments at 2 ("It is imperative that we

maintain strong nationwide Clean Water Act standards to ensure that individual states, or groups of states, cannot benefit from the location of industry, business, or other activities within those states, on the expectation of lower environmental regulatory hurdles."). As the Court observed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), "prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Id.* at 282.

The on-the-ground experience of the States hammers these points home. Montana's comments, for example, draw us back to one of the worst flooding disasters in our nation's history, the 1993 flood of the Missouri and Mississippi Rivers, which took 70 lives, caused more than $10 billion in property damage, and disrupted the use of those rivers as channels of commerce. *See* Montana Comments at 4; New York Att'y Gen'l Comments at 19. Montana explains, "The 1993 flood in the Upper Missouri River Basin is a good case study of the value of wetlands in absorbing and moderating flood flows." Montana Comments at 4. Wetland destruction in the basin "represents the loss of up to 90 million acre-feet of potential flood storage, which is more than twice the volume of the 1993 Mississippi River flood at St. Louis." *Id.* For every acre of wetlands destroyed, Montana estimates "an average of 1 million gallons of water run off quickly downstream instead of being stored and slowly released as the river level drops." *Id.*

Montana emphasizes that it is a "headwater state." *Id.* Headwater States export floodwaters, with the greatest flood damage frequently occurring hundreds of miles and many States downstream. Much of the water that Montana

would otherwise export is contained in wetlands that play an invaluable role by "absorbing runoff and moderating flood flows for downstream states." *Id.* Montana recognizes the benefits of preserving these wetlands, but concludes that "[t]hese wetlands will be highly vulnerable to filling and draining in the absence of protection under Section 404 of the CWA." *Id.* at 2. It is politically difficult – if not impossible – for a State to tell its own citizens that they have to forego development on their own property in order to prevent the risk of exacerbating flooding in a State downstream. That, Montana argues, is the role of the federal government.

North Dakota tells a similar story about its wetlands and flooding on the Red River, noting that "[w]etland drainage is known to have contributed to the recent flooding problems" in the river basin. North Dakota Comments at 2. The Red River originates with headwaters in North Dakota, South Dakota, and southern Minnesota. It flows north, forming the border between Minnesota and North Dakota until crossing into Canada, where it flows through the City of Winnipeg and ultimately empties into Lake Winnipeg.

The 1997 Red River flood was catastrophic, burying towns including Grand Forks, North Dakota, East Grand Forks, Minnesota, and Ada, Minnesota. At Grand Forks, the river was more than 26 feet above flood stage. The flood continued into Canada where it peaked just inches below the levees that protect Winnipeg, a city of more than 650,000 that serves as a Canadian provincial capital. *See, e.g.*, *North Dakota's Runaway River*, BOSTON GLOBE, Apr. 22, 1997 at A14; Dirk Johnson, *Flooding Crests in Ravaged City: Residents Face Weeks of Anxiety*, N.Y. TIMES, Apr. 22, 1997 at A1; Anthony DePalma, *Winnipeg Journal: As Red*

River Crests, Manitoba Holds its Breath, N.Y. TIMES, May 3, 1997, Section 1, at 4.

The story of the Red River flood illustrates the international dimension of the problem of protecting headwater wetlands and streams. North Dakota and Minnesota have every incentive to protect their citizens against catastrophic floods. But they cannot control the actions of the other States in the Red River watershed. And the solution that is best for North Dakota or Minnesota might not be best for the United States. A decision to respond to flood risks by increasing the size of dikes and levees – instead of protecting wetlands – will result in the export of floods to Canada and could cause deterioration in our nation's relationship with Canada. While flooding is a local problem, it is simultaneously a national and international problem.

So is pollution of our nation's waters. Nebraska explains that wetlands and intermittent and ephemeral streams that form part of the watershed of the Little Blue River in that State have been prioritized for protection by the federal government because of the role these resources play in protecting the Little Blue as a drinking water source for Kansas communities, including Kansas City. Nebraska Dep't of Envt'l Quality Comments at 3. Nebraska concludes that "[w]ithout solid CWA protection, impacts to drinking water downstream could prove serious and extremely costly." *Id.*

Indiana gives a more complex, but even more compelling, example of the need for a federal role in limiting the spread of a "dead zone" in the Gulf of Mexico. Indiana explains: "Wetlands and headwater streams are particularly valuable for their ability to filter pollutants such as

nitrate from water. Nitrate laden runoff is a growing concern nationally and clearly moves across state lines." Indiana Comments at 2.

Runoff of nutrients such as nitrate (a particularly mobile form of nitrogen) and phosphorus harms the health of many water bodies through eutrophication, which occurs when an excessive supply of nutrients stimulates the growth of algae, whose subsequent death produces organic decay. The decay of organic matter depletes the dissolved oxygen in the water required for aquatic life. In the resulting hypoxic area or "dead zone," a severe oxygen deficiency causes most aquatic organisms to suffocate. Locally, excessive nutrient loads decrease the resource value of rivers, lakes, and estuaries, hindering recreation, fishing, hunting, and aesthetic enjoyment.

Nationally, hypoxia is plaguing water bodies – including the Gulf of Mexico, the Chesapeake Bay, and the Long Island Sound – that are vital to the nation's economic future. In recent years in the Gulf, there has been a dead zone the size of New Jersey located off the Texas and Louisiana coasts. As the National Oceanic and Atmospheric Administration explains, "the hypoxic zone forms in the middle of the most important commercial and recreational fisheries in the coterminous United States and could threaten the economy of this region of the Gulf."[13] Congress responded directly to this problem in 1998, enacting the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998, Title VI of Public Law 105-383.

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[13] National Oceanic and Atmospheric Administration, *Hypoxia in the Gulf of Mexico: Progress towards the completion of an Integrated Assessment* (available at http://oceanservice.noaa.gov/products/pubs_hypox.html#Intro).

Among Congress's findings were that "53 percent of United States estuaries experience hypoxia for at least part of the year" and that "harmful algal blooms may have been responsible for an estimated $1,000,000,000 in economic losses during the past decade." 33 U.S.C. § 1451.

While the national and local problems are linked, the solution to these problems varies. The reason stems from differences in the chemical characteristics of nitrate and phosphorus. Nitrate is highly mobile and water soluble, while phosphorus is immobile and quickly attaches itself to the soil. Thus, locally, phosphorus is often the biggest nutrient problem; nationally, the problem is nitrate and other forms of nitrogen. *See generally* Standards for the Use or Disposal of Sewage Sludge, Part II, 58 Fed. Reg. 9248, 9276 (Feb. 19, 1993).

Because Indiana wants to protect its farmers and its water, it regulates phosphorus, the "easier to regulate co-limiting nutrient in Indiana's waters." Indiana Comments at 5. Indiana admits that political realities mean that it "has not regulated nitrate discharges in the past and probably may not regulate this nutrient in the future * * * ." *Id.* At the same time, however, Indiana wants the "federal government to be proactive" in protecting headwater streams and wetlands because they are effective filters of nitrogen, and their loss could increase regulatory burdens for downstream States. *Id.* at 1. Leaving the protection of such water resources to the States, Indiana suggests, would be a disaster, "a patchwork quilt of uneven regulation [that] will threaten overall water quality." *Id.*

States such as Michigan and New Jersey reach the same conclusion but from a different perspective: that of the downstream State. Michigan and New Jersey are the

only two States that have assumed responsibility for implementing section 404 to protect wetlands and other waters from dredging and filling. These states strongly support a broad Clean Water Act because the health of their citizens depends upon the actions of other States, which may not fill the gaps left by the federal government's retreat from the field of water pollution prevention. In Michigan's words:

> [G]iven the fundamental importance of our freshwater resources to the public, it is essential that the federal standards be maintained not only in Michigan but in states whose actions impact Michigan. The State of Michigan exists on two peninsulas in the center of the Great Lakes, and we are ever aware that the quality of those interstate and international waters that surround us is influenced not only by the actions of our own citizens, but by those of other states (and other nations).

Michigan Comments at 4.

New Jersey is even more pointed and specific in its comments, noting that, in its view, its upstream neighbor New York does not regulate certain wetland areas in New York that provide important downstream benefits to New Jersey. Federal regulation, New Jersey concludes, "therefore plays an essential role in the protection of these areas and consequently the water resources that they affect within New Jersey." New Jersey Comments at 2. New York's comments reinforce New Jersey's concern, recognizing that there are "numerous" non-navigable streams and wetlands not covered by its environmental programs that "are reliant upon Sections 404 and 401 of the Clean Water Act regulation" for protection. New York DEC Comments

at 2. New York acknowledges it is "not likely that alternative conservation programs or regulations at the state or local level will provide adequate or appropriately broad surrogate protection should Clean Water Act jurisdiction be reduced." *Id.* "Strong nationwide protection," New York argues, "ensures that upstream states cannot export pollutants to downstream communities." *Id.*

II. State Water Quality Protections Are Inextricably Enmeshed with Longstanding Federal Protections and Would Be Severely Undermined by Constricting those Federal Protections.

The phrase "cooperative federalism" is not a meaningless bromide, but a daily reality for the State officials directly responsible for protecting our nation's waters. The efficacy of this State-federal partnership depends heavily on the definition of "waters of the United States" because this term provides a key jurisdictional limit throughout the entirety of the Clean Water Act. *See* page 6, *supra*.

Petitioners suggest that the Court need not be concerned about the harm that would result from eliminating federal protections for intrastate non-navigable waters because, in their view, the States could step in to fill the regulatory gap. This argument ignores the on-the-ground reality of our nation's water protection programs.

First, some two-thirds of the States lack independent regulatory programs that would fully protect intrastate wetlands. *See* Jon Kusler, Ass'n of State Wetland Managers, *The* SWANCC *Decision: State Regulation of Wetlands to Fill the Gap*, at 13-14 (Updated and Revised March 4, 2004), available at http://www.aswm.org/fwp/swancc/aswm-int.

pdf. Instead, they fulfill their responsibilities to the State-federal partnership under the Act through the certification process established in section 401, which gives each State authority to prevent the issuance of a federal permit if the State determines it would violate the Act.[14]

Through this certification authority, many States implement vigorous protections for intrastate wetlands without the prohibitive expense of creating and administering independent State permitting programs. *See, e.g.*, New Mexico Dep't of Game & Fish Comments at 4-6 (discharges into wetlands and other intrastate waters from industrial sources contaminated groundwater and surface water used for agriculture, livestock, and other commercial enterprises, but through its section 401 authority, New Mexico has made "significant strides" in protecting against this harm without the burden and expense of a separate permitting scheme); Massachusetts Dep't of Envt'l Protection Comments at 3 ("Reduced federal protections, and the associated contraction of 401 jurisdiction, will result in the loss of * * * valuable and threatened habitats.").

Second, for many years States have fully integrated their water protection programs into the federal program. The State-federal partnership is not an easily bifurcated pie, but a mosaic of interlocking and interdependent parts. It has developed over the course of 30 years, with the States relying on federal protections for many intrastate

[14] 33 U.S.C. § 1341 (requiring an applicant for a federal permit for activity that might result in a discharge into U.S. waters to provide a certification from the relevant State or regional water pollution control agency that the discharge will comply with specified provisions of the Act).

waters. *See, e.g.*, ASIWPCA Comments at 2 (if established federal protections are constricted, "[r]egulatory confusion would ensue as each state in turn adopts a different set of procedural and substantive requirements."); Massachusetts Dep't of Envt'l Protection Comments at 1 (restricting federal protections "will result in longer state permitting review time for many projects"); Minnesota Comments at 8, 11 (changes in federal protections will jeopardize long-standing "institutional arrangements" in the State, which have achieved an "optimal" balance in the State-federal partnership); Wisconsin Comments at 2 ("Any change in federal jurisdiction will require states to analyze the impact on their programs and enter into a costly political process to determine the applicable and appropriate scope of state programs and jurisdiction.").

The views of the State of Michigan are especially salient because it is one of two States (with New Jersey) that have directly assumed responsibility for the section 404 program. Michigan emphasizes that "[a]lthough it may appear counterintuitive, * * * a patchwork reduction in federal jurisdiction would significantly decrease the efficiency of the state/federal program, due to the need to differentiate between 'federal' and 'non-federal' wetlands, and impose much greater responsibility for coordination with other federal resource programs on the permit applicant." Michigan Comments at 2.

Under Michigan's existing section 404 program, the landowner files a single application with the State, which is then reviewed for compliance with a wide range of State and federal requirements, including endangered species protections, water quality standards, coastal zone protections, historic preservation requirements, and floodplain impacts. The process is seamless, and State law requires a

final decision within 90 days. *Id.* at 14. To the extent that federal jurisdiction is curtailed, however, Michigan's ability to coordinate with other federal programs would be eliminated, leaving the applicant to negotiate with those programs individually, an extremely burdensome process. *Id.* A patchwork system would require far more bureaucracy and undercut the efficient State-federal partnership currently in place. It would be especially ironic if this active partner, the first State to assume administration of the section 404 program, were to suffer harm to its ecosystems and economy due to a misguided notion of federalism and State prerogatives.

Third, many States simply do not have the resources and institutional capacity to protect intrastate waters if longstanding federal protections were invalidated. Wyoming put it bluntly, insisting that it is "naïve" to expect the States to fill the regulatory gap in an adequate fashion, particularly in rural settings where the need for protection is the greatest. Wyoming Comments at 6; *see also* Nebraska Dep't of Envt'l Quality Comments at 1 (curtailment of federal protections would "strain state resources and dramatically reduce our ability to protect the waters of the State."); Pennsylvania Comments at 3 (any assumption that States would fill the regulatory gap ignores "political, budgetary [and] staffing realities").

The State that gave rise to *SWANCC*, Illinois, likewise opposes any modification of the regulatory definition of "waters of the United States." This position is especially noteworthy because the landowner in *SWANCC* represented to this Court that federal protections were "objectionably intrusive into a well-functioning state regulatory

scheme."[15] But two years later the Illinois Department of Natural Resources forcefully argued to the Corps and EPA that curtailment of federal jurisdiction "would undermine the State of Illinois 'no net loss' goals, adversely impact Illinois' important wetland resources and degrade our recreational economy." Illinois Comments at 2. Illinois stressed that restricting the federal role would imperil some of the most pristine wetlands that remain, and "[i]f we destroy non-navigable streams (tributaries), we will soon imperil the larger waterways as well." *Id.* at 1.

Finally, even in States with the resources to help fill a regulatory gap, during the time it would take to enact gap-filling measures many developers would rush to destroy unprotected streams and wetlands, and the States could suffer devastating and irreplaceable losses. *E.g.* Florida Comments at 9 (if federal protections for intrastate non-navigable waters were reduced, there could be significant wetland loss in rapidly developing areas of Florida during the lag time prior to implementation of new State protections).

The States' experience in the aftermath of *SWANCC* is instructive. Less than two years after the *SWANCC* ruling, developers already had destroyed thousands of acres of isolated wetlands and other isolated waters even though the ruling left open other bases for federal jurisdiction over those waters. *See* Traci Watson, *Developers rush to build in wetlands after ruling*, USA TODAY, Dec. 6, 2002, at 15A. Indeed, the bulldozers were ready to move as soon as

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[15] Brief for the Petitioner, at 30, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

developers received notice of the *SWANCC* ruling: "The very day [*SWANCC*] hit the press, I was driving from Galveston to Houston, and I counted no less than six huge tracts of land where bulldozers were knocking everything down," says James Jones, a senior consultant with a wetlands firm and a former wetlands regulator. "And they hadn't been developed because there were isolated wetlands in them." *Id.*[16]

In short, Petitioners have it exactly backwards in arguing that the Court should read the Clean Water Act narrowly to avoid a change in the State-federal balance. As described above, the Corps' and EPA's longstanding reading of the Act is essential to maintaining the well-established State-federal partnership.

III. The Congress May Prevent the Destruction of Intrastate Non-Navigable Waters as Necessary and Proper Regulation of Activity that Threatens Channels of Commerce.

The natural meaning of the phrase "waters of the United States" includes waters within our nation's borders regardless of their navigability. This plain meaning is fully

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[16] During an unrelated, temporary regulatory gap at the federal level, more than 20,000 acres of wetlands were drained and more than 150 miles of streams channelized without section 404 reviews, significantly increasing the risk of flooding and harm to downstream properties and pollution of streams and rivers. 65 Fed. Reg. 50108 (Aug. 16, 2000). Some developers evidently concluded that "if you don't ask, you don't have to worry about being told no." 66 Fed. Reg. 4550, 4569 (Jan. 17, 2001). For a similar, recent example from the context of zoning, see Amy Gardner, *Loudoun Developers Sprint to File Plans: Applications for 21,000 Homes Submitted in Bid to Outrun Limits in County*, WASHINGTON POST, January 10, 2006, at B1.

consonant with the Act's express purpose to restore and maintain the ecological integrity of "the Nation's waters." 33 U.S.C. § 1251(a). And the explicit statutory reference to the protection of "wetlands" in section 404(g)(1) of the Act provides clear textual evidence that these waters include adjacent wetlands. *Id.* § 1344(g)(1).

Indeed, the entirety of section 404(g) would be rendered nugatory if the term "navigable waters" were read to reach only traditional navigable waters and their adjacent wetlands. That provision authorizes a State to administer its own permit program for the discharge of dredge and fill material into "navigable waters" in lieu of the federal program, but it expressly prevents a State from assuming authority over traditional navigable waters, thereby retaining federal jurisdiction over these waters.[17] If the phrase "navigable waters" were limited to traditional navigable waters, there would be nothing left for the States to regulate under section 404(g), and the entire provision would be without effect. *See* Brief of the States of New York, Michigan, *et al.* as *Amicus Curiae* in Support of Respondents, at Section II.

The doctrine of grave constitutional doubt does not require a different analysis. The State comments shed important light on this question. They illustrate how the protection of intrastate tributaries and their adjacent wetlands – even those streams and adjacent wetlands miles from traditional navigable waters – is essential to

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[17] 33 U.S.C. § 1344(g)(1) (a State may not assume exclusive authority over "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including * * * wetlands adjacent thereto").

any comprehensive effort to protect our traditional navigable waters. There is no attenuated string of connections necessary to link the concerns expressed by the States to interstate commerce. Rather, the States show that protecting wetlands is critical to preventing floods and protecting the quality of our nation's traditional navigable waters. Limiting the destruction of tributaries is both a necessary and a proper congressional action to protect traditional navigable waters – the quintessential "channel of interstate commerce."

The State comments also explain why States acting alone cannot effectively address the harm to traditional navigable waters caused by the destruction of headwater streams and wetlands. Downriver States cannot control the actions of their upriver neighbors, and these upriver States have strong incentives to choose growth over resource protection because much of the cost of resource destruction is exported. As the Court declared in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), "[t]he power granted Congress [under the Commerce Clause] is a positive power * * * to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." *Id.* at 552. Specifically in the context of environmental law, the Court held in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282.

The States also warn that a reduction in federal protections could lead to a regulatory "race-to-the-bottom."

The existence of interstate externalities skews the political incentives against environmental protection in both upstream and downstream States. Voters in upstream States might well reject regulatory measures that will impose significant costs where they live while delivering benefits only to communities downstream. Voters in downstream States might well conclude that regulation in their State is not worthwhile because it cannot solve the environmental problem by itself due to the lack of protections in upstream States. *See generally* REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM" 21-28 (Douglas T. Kendall ed., 2004). As the Court observed in *Hodel*, "prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." 452 U.S. at 282.

Due to the tremendous harm to navigable channels of commerce and downstream States that would result from the loss of intrastate non-navigable waters, federal protections for these waters lie at the very heart of federal Commerce Clause authority. For more than 100 years, the Court has recognized that federal Commerce Clause power over navigable waters as channels of commerce extends to the entire watershed, including non-navigable tributaries. *E.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 708 (1899) (upholding federal jurisdiction over non-navigable portions of the Rio Grande).

The early cases like *Rio Grande Dam* largely involved navigability, but the Court soon recognized that Congress may use the same broad Commerce Clause power to promote other values and interests, such as flood control. In *Oklahoma v. Atkinson*, 313 U.S. 508 (1941), for example, the Court unanimously upheld the assertion of federal

Commerce Clause authority over 150,000 acres (including vast expanses of uplands) surrounding the Red River, a non-navigable tributary of the Missouri River, to improve flood control and produce hydropower. The Court stressed it is entirely appropriate to exercise this authority throughout "the entire basin" (*id.* at 525) even where the flood control enhancement was "somewhat conjectural" (*id.* at 526). In language that could not be clearer, the Court emphasized "[t]here is no constitutional reason why Congress cannot, under the commerce power, treat *the watersheds* as a key to flood control on navigable streams and their tributaries." *Id.* at 525 (emphasis added).

Unlike the Migratory Bird Rule at issue in *SWANCC*, which was untethered from channels of commerce, the federal protections at issue here are essential to the protection of our nation's navigable waters, which serve as channels of commerce. Moreover, Congress may regulate the destruction of intrastate non-navigable wetlands and other waters as a class of activity due to harm caused by the class as a whole, even though certain instances might have only a trivial impact. *See, e.g.*, *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005). The Court applied this class-of-activity analysis to the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985) (the Corps may regulate wetlands adjacent to traditional navigable rivers even though "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water").

Accordingly, the doctrine of grave constitutional doubt has no application here. This doctrine should not be used to create "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres v.*

United States, 523 U.S. 224, 238 (1998). It properly applies only where the statute is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a fair one." *Id.*; *accord*, *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991) (declining to apply doctrine although petitioner's constitutional claims were not "without some force").

The underlying purpose of the doctrine – the effectuation of congressional will – makes it especially inappropriate where, as here, the Congress sought to exercise its full constitutional authority. *See* S. Conf. Rep. No. 92-1236, at 144 (1972) (the conferees intend that the Act "be given the broadest possible constitutional interpretation"); S. Rep. No. 95-370, at 75 (1977) (the Act "exercise[s] comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent."). To implement congressional will in this context, the Court needs to decide the Commerce power issue, and not avoid that responsibility through a narrowing construction that would directly undercut Congress's express intent to exercise its full constitutional authority.

CONCLUSION

The judgments of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

TIMOTHY J. DOWLING*
DOUGLAS T. KENDALL
JENNIFER BRADLEY
COMMUNITY RIGHTS COUNSEL
1301 Connecticut Avenue NW
Suite 502
Washington, D.C. 20036
(202) 296-6889

**Counsel of Record*

January 2006

APPENDIX A

A LIST OF STATE COMMENTS REGARDING THE DEFINITION OF "WATERS OF THE UNITED STATES" URGING CONTINUED FEDERAL PROTECTION FOR INTRASTATE TRIBUTARIES AND ADJACENT WETLANDS

(The comments are available at http://www.asiwpca.org/statecomments.htm)

Arizona:	Letter from Duane L. Shroufe, Director, Arizona Game and Fish Department, to U.S. Environmental Protection Agency (April 15, 2003)
Arizona:	Letter from Karen L. Smith, Director, Water Quality Division, Arizona Department of Environmental Quality, to U.S. Environmental Protection Agency (April 15, 2003)
Arkansas:	Letter from Scott Henderson, Director, Arkansas Game and Fish Commission, to U.S. Environmental Protection Agency (April 15, 2003)
California:	Letter from Arthur G. Baggett, Jr., Chair, State Resources Control Board, to U.S. Environmental Protection Agency (March 14, 2003)
California:	Letter from Mary D. Nichols, Secretary, California Resources Agency, and Winston Hickox, Secretary, California Environmental Protection Agency, to U.S. Environmental Protection Agency (July 3, 2003)
Delaware:	Letter from John A. Hughes, Secretary, Delaware Department of Natural Resources and Environmental Control, to

U.S. Environmental Protection Agency (April 16, 2003)

Florida: Letter from Janet G. Llewellyn, Deputy Director, Division of Water Resource Management, Florida Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)

Georgia: Letter from David Waller, Director, Georgia Department of Natural Resources, to U.S. Environmental Protection Agency (April 17, 2003)

Hawaii: Letter from June F. Harrigan-Lum, Manager, Environmental Planning Office, Hawaii Department of Health, to U.S. Environmental Protection Agency (April 16, 2003)

Idaho: Letter from Dirk Kempthorne, Governor of Idaho, to U.S. Environmental Protection Agency (April 16, 2003)

Illinois: Letter from Joel Brunsvold, Director, Illinois Department of Natural Resources, to U.S. Environmental Protection Agency (April 11, 2003)

Indiana: Letter from Lori F. Kaplan, Commissioner, Indiana Department of Environmental Management, to U.S. Environmental Protection Agency (April 16, 2003)

Iowa: Letter from Jeffery R. Vonk, Director, Iowa Department of Natural Resources, to U.S. Environmental Protection Agency (March 31, 2003)

Kansas:	Letter from Chris Hase, Environmental Services Section, Kansas Department of Wildlife and Parks, to U.S. Environmental Protection Agency (April 15, 2003)
Kentucky:	Letter from Jeffery W. Pratt, Director, Division of Water, Kentucky Natural Resources and Environmental Protection Cabinet, to U.S. Environmental Protection Agency (March 13, 2003)
Louisiana:	Letter from James H. Jenkins Jr., Secretary, Louisiana Department of Wildlife and Fisheries, to U.S. Environmental Protection Agency (April 1, 2003)
Maine:	Letter from David Van Wie, Director, Bureau of Land and Water Quality, Maine Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Massachusetts:	Letter from Cynthia Giles, Assistant Commissioner, Massachusetts Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Massachusetts:	Letter from Russ Cohen, Rivers Advocate, Massachusetts Riverways Program, Massachusetts Department of Fish and Wildlife, to U.S. Environmental Protection Agency (February 28, 2003)
Michigan:	Letter from Steven E. Chester, Director, Michigan Department of Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)

Minnesota:	Letter from Gene Merriam, Commissioner, Minnesota Department of Natural Resources, Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, and Ronald Harnack, Executive Director, Minnesota Board of Water and Soil Resources, to U.S. Environmental Protection Agency (April 8, 2003)
Minnesota:	Letter from Tim Pawlenty, Governor of Minnesota, to U.S. Environmental Protection Agency (April 14, 2003)
Missouri:	Letter from John D. Hoskins, Director, Missouri Department of Conservation, to U.S. Environmental Protection Agency (February 28, 2003)
Missouri:	Letter from Norman P. Stucky, Fisheries Division Administrator, Missouri Department of Conservation – Fisheries, to U.S. Environmental Protection Agency (March 12, 2003)
Missouri:	Letter from Scott B. Totten, Division Director, Water Protection and Soil Conservation, Missouri Department of Natural Resources, to U.S. Environmental Protection Agency (March 4, 2003)
Montana:	Letter from Jan P. Sensibaugh, Director, Montana Department of Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)
Nebraska:	Letter from Mike Linder, Director, Nebraska Department of Environmental Quality, to U.S. Environmental Protection Agency (April 11, 2003)

Nebraska:	Letter from Kirk Nelson, Assistant Director, Nebraska Department of Game & Parks, to U.S. Environmental Protection Agency (April 2, 2003)
New Jersey:	Letter from Bradley M. Campbell, Commissioner, New Jersey Department of Environmental Protection, to U.S. Environmental Protection Agency (April 15, 2003)
New Mexico:	Letter from Larry G. Bell, Director, New Mexico Department of Game and Fish, to U.S. Environmental Protection Agency (April 15, 2003)
New Mexico:	Letter from Bill Richardson, Governor of New Mexico, to U.S. Environmental Protection Agency (March 5, 2003)
New York:	Letter from Peter Lehner, Bureau Chief, Environmental Protection Bureau, New York Attorney General's Office, to U.S. Environmental Protection Agency (April 16, 2003)
New York:	Letter from Erin M. Crotty, Commissioner, New York Department of Environmental Conservation, to U.S. Environmental Protection Agency (March 27, 2003)
North Carolina:	Letter from David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Commission, to U.S. Environmental Protection Agency (April 15, 2003)
North Dakota:	Letter from Dean Hildebrand, Director, North Dakota Game and Fish Department, to U.S. Environmental Protection Agency (April 14, 2003)

Ohio:	Letter from Samuel W. Speck, Director, Ohio Department of Natural Resources, to U.S. Environmental Protection Agency (March 3, 2003)
Oklahoma:	Letter from Greg D. Duffy, Director, Oklahoma Department of Wildlife Conservation, to U.S. Environmental Protection Agency (April 14, 2003)
Pennsylvania:	Letter from John T. Hines, Acting Deputy Secretary for Water Management, Pennsylvania Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Rhode Island:	Letter from Jan H. Reitsma, Director, Rhode Island Department of Environmental Management, to U.S. Environmental Protection Agency (April 16, 2003)
South Carolina:	Letter from Alton C. Boozer, Chief, Bureau of Water, South Carolina Department of Health and Environmental Control, to U.S. Environmental Protection Agency (April 16, 2003)
South Carolina:	Letter from Robert E. Duncan, Environmental Programs Director, South Carolina Department of Natural Resources, to U.S. Environmental Protection Agency (March 21, 2003)
South Dakota:	Letter from John L. Cooper, Department Secretary, Department of Game, Fish and Parks, to U.S. Environmental Protection Agency (April 14, 2003)
South Dakota:	Letter from Steven M. Pirner, Secretary, South Dakota Department of Environment and Natural Resources, to U.S.

	Environmental Protection Agency (April 16, 2003)
Tennessee:	Letter from Gary T. Myers, Executive Director, Tennessee Wildlife Resources Agency, to U.S. Environmental Protection Agency (February 26, 2003)
Texas:	Letter from Margaret Hoffman, Executive Director, Texas Commission on Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)
Texas:	Letter from Thomas G. Heger, Texas Parks and Wildlife Department, to U.S. Environmental Protection Agency (April 16, 2003)
Vermont:	Letter from Jeffrey Wennberg, Commissioner, Vermont Agency of Natural Resources, to U.S. Environmental Protection Agency (April 16, 2003)
Virginia:	Letter from S. René Hypes, DCR-DNH Project Review Coordinator, Virginia Department of Conservation, to U.S. Environmental Protection Agency (April 14, 2003)
Virginia:	Letter from William L. Woodfin, Jr., Director, Virginia Department of Game, to U.S. Environmental Protection Agency (April 15, 2003)
Washington:	Letter from Sabra W. Hull, Wetlands Specialist, Land Management Division, Washington Department of Natural Resources, to U.S. Environmental Protection Agency (April 15, 2003)
West Virginia:	Letter from William D. Brannon, Acting Director, Division of Water and Waste Management, West Virginia Department

of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)

West Virginia: Letter from Curtis I. Taylor, Chief, Wildlife Resources Section, West Virginia Department of Natural Resources – Wildlife, to U.S. Environmental Protection Agency (February 26, 2003)

Wisconsin: Letter from P. Scott Hassett, Secretary, Wisconsin Department of Natural Resources, to U.S. Environmental Protection Agency (April 8, 2003)

Wyoming: Letter from Julie Kozlowski, Assistant Director, Office of Federal Land Policy, John Jackson, Administrator, Planning, Wyoming Department of Fish and Game, and Bill Wichers, Deputy Director, Wyoming Water Development Commission, to U.S. Environmental Protection Agency (March 3, 2003)

Nos. 04-1034 and 04-1384

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et ux.*, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF STATE WETLAND MANAGERS, ASSOCIATION OF STATE FLOODPLAIN MANAGERS, AND NEW ENGLAND INTERSTATE WATER POLLUTION CONTROL COMMISSION IN SUPPORT OF RESPONDENT UNITED STATES

STEPHEN M. JOHNSON
MERCER UNIVERSITY
SCHOOL OF LAW
1021 Georgia Avenue
Macon, Georgia 31207
(478) 301-2192

Counsel for Amici Curiae Association of State Wetland Managers, et al.

PATRICK PARENTEAU
ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC
VERMONT LAW SCHOOL
PO Box 300
South Royalton, Vermont 05068
(802) 831-1305

Counsel of Record for Amici Curiae Association of State Wetland Managers, et al

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INTEREST OF *AMICI* [1]

The Association of State Wetland Managers (ASWM), the Association of State Floodplain Managers (ASFPM), and the New England Interstate Water Pollution Control Commission (NEIWPCC) submit this brief in support of Respondent United States. ASWM is a nonprofit membership organization established in 1983 to enhance protection and management of wetland resources, to promote application of sound science to wetland management efforts, and to provide training and education for our members and the public. ASFPM is an organization of professionals involved in floodplain management, flood hazard mitigation, the National Flood Insurance Program, and flood preparedness, warning and recovery. NEIWPCC is a nonprofit interstate agency established by an Act of Congress in 1947 that serves and assists its member states in the Northeast by providing coordination, public education, research, training, and leadership in water management and protection.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act Amendments of 1972, the modern Clean Water Act (Act), established a national commitment to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The Act has been instrumental in improving the health of rivers, lakes, and coastal waters. It has stopped billions of pounds of pollution from fouling the water, saved thousands of acres of wetlands, protected public water supplies, and dramatically increased the number of waterways that are safe for swimming and fishing. Yet much remains to be done. Nearly forty percent of the nation's waters still do not meet water quality

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

standards. Continued progress depends on how the Court resolves the fundamental jurisdictional issues presented in these consolidated cases.

Petitioners offer crabbed and unscientific interpretations of the term "waters of the United States" as used in the Act. Rapanos asserts that the Act reaches no farther than "traditionally navigable waters" and wetlands that "physically abut" them. By this measure the vast majority of the waters of the United States that Congress intended to protect, and many of the sources of pollutants that Congress intended to regulate, would lie outside the geographic scope of the Act. Such a dramatic reduction in the Act's scope at this late date would wreak havoc within a broad spectrum of water quality programs at every level of government.

Carabell takes a somewhat different tack, arguing that "waters of the United States" can never include a body of water that lacks a "physical connection" to a traditional navigable water. According to Carabell's theory, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) must prove such a connection for every discharge permit, a wholly unworkable and unnecessary requirement that would impose substantial costs on both the government and permit applicants.

There is no merit to either of these novel jurisdictional theories.

First, petitioners' statutory interpretations flatly contradict Congressional intent. Both as initially enacted in 1972 and as amended in 1977, Congress made it clear that the purpose of the Clean Water Act was to restore and maintain the integrity of the nation's waters by controlling polluting discharges at the source. Congress intentionally abandoned its previous reliance on concepts of navigability and instead made water quality and ecological integrity the touchstones of the statutory and regulatory program. Moreover, Congress repeatedly demonstrated its commitment to protecting wetlands as key

components of aquatic ecosystems. Significantly, in 1977 Congress rejected proposals to reduce the geographic scope of the section 404 permit program as petitioners suggest.

Second, petitioners misconstrue this Court's unanimous decision in *Riverside Bayview*. Contrary to Rapanos' argument, *Riverside Bayview* did not hold that adjacent wetlands must "physically abut" a traditional navigable water. Rather the Court upheld the Corps' broad, programmatic interpretation of "waters of the United States" as including the entire tributary system of navigable waters and adjacent wetlands. Further, contrary to Carabell's argument, *Riverside Bayview* did not require proof of a "physical connection" between wetlands and navigable waters. Rather the Court deferred to the Corps' expert judgment that wetlands in close proximity to "waters of the United States" were "within the class of waters" subject to regulation under the Act.

Third, petitioners' reliance on *SWANCC* is misplaced. *SWANCC* held that the Corps overreached when it asserted jurisdiction over an "isolated" sand and gravel pit used by migratory birds. Here, the Corps has asserted jurisdiction over wetlands that are "adjacent to," and "inseparably bound up" with, tributaries of navigable waters within the meaning of *Riverside Bayview* as reaffirmed in *SWANCC*.

Fourth, the weight of judicial authority strongly supports the agencies interpretation here. Petitioners' reliance on the minority view of the Fifth Circuit, expressed in dictum, is misplaced in light of the countervailing authority as reflected in the thorough and well reasoned decisions of the Fourth Circuit in the *Deaton* case and the Seventh Circuit in *Gerke*.

Finally, petitioners' arguments that the regulation of these wetlands raises Federalism concerns under the Commerce Clause are well off the mark. Under its broad power over the "channels of commerce," Congress has ample authority to prevent degradation of navigable waters by regulating discharges into nonnavigable tributaries and adjacent wetlands.

Moreover, Congress has authority under the Commerce Clause to regulate the discharge of pollutants as a class of economic activity having, in the aggregate, a substantial effect on interstate commerce.

For all of these reasons, Amici respectfully request that the judgment of the Sixth Circuit in each of these cases be affirmed.

ARGUMENT

I. BY DEFINING "NAVIGABLE WATERS" TO MEAN "WATERS OF THE UNITED STATES" CONGRESS MEANT TO EXPAND THE GEOGRAPHIC SCOPE OF THE CLEAN WATER ACT TO INCLUDE TRIBUTARIES AND ADJACENT WETLANDS

The Clean Water Act prohibits the discharge of pollutants, including dredge or fill material, into "navigable waters" without a permit under sections 402 or 404 of the Act. 33 U.S.C. § 1331(a). The Act defines "navigable waters" as "waters of the United States including the territorial sea." 33 U.S.C. § 1362(7). Regulations of the Corps and the EPA further define "waters of the United States" to include tributaries and adjacent wetlands. 33 C.F.R. § 328.3(a)(5)(7); 40 C.F.R. § 122.2. Petitioners challenge the validity of these regulations as applied to wetlands on their property. Thus, the crux of the issue here is whether the agencies' interpretation of Congressional intent is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (Chevron).

It is axiomatic that, in determining the meaning of a statute, courts look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Contrary to this core principle of statutory construction, petitioners insist on a literal reading of the words "navi-

gable waters" that disregards the object, structure, policy, and historical context of the 1972 Act. To understand what Congress had in mind at that time, it helps to recall a few of the dramatic events that stirred it to action. The Cuyahoga River was so contaminated with industrial waste it regularly caught fire.[2] Lake Erie was so polluted with untreated sewage scientists pronounced it "dead."[3] An oil spill in 1969 coated the beaches of Santa Barbara.[4] A record-setting fish kill—26 million fish—had just occurred in Lake Thonotasssa, Florida.[5]

These conditions did not arise overnight. Congress had enacted no less than six federal statutes in the previous 24 years in an effort to develop a workable approach to pollution control,[6] only to conclude that the entire effort had been "inadequate in every vital aspect." Congressional Research Service, 95th Cong., 1st Sess., Legislative History of the Federal Water Pollution Control Act Amendments (hereafter "Leg. Hist.") Vol. 2 at 1425 (1973) (Senate Committee Report). As this Court recognized in *Envtl. Prot. Agency v. California ex rel. State Water Resources Bd.*, 426 U.S. 200,

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[2] *See* http://www.epa.gov/glnpo/aoc/cuyahoga.html (accessed Jan. 5, 2006).

[3] *See* http://www.usatoday.com/news/science/enviro/2002-06-14-erie.htm (accessed Jan. 5, 2006).

[4] *See* http://www.countyofsb.org/energy/information/1969blowout.asp (accessed Jan. 5, 2006).

[5] *See* Hon. James Oberstar, *The Clean Water Act in Peril*, 6, House Committee on Transportation (Oct. 18, 2002), available at http://www.house.gov/transportation_democrats/Of_Interest/021017_CleanWaterActRept.pdf (accessed Jan. 5, 2006).

[6] Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155; Federal Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87- 88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91.

203 (1976), the 1972 Act was passed to remedy these failings, including the complete failure of the federal enforcement program. Under the pre-1972 legislation, federal abatement suits were limited to pollution of interstate, navigable-in-fact, or coastal waters.[7] As a result only one case had been brought between 1948 and 1972, and it failed.

Viewed against this backdrop, petitioners' argument that Congress intended to do no more than tinker at the edges of federal navigability doctrines is unpersuasive. By defining "navigable waters" to mean "waters of the United States" Congress clearly signaled its intent to abandon the jurisdictional limits that had foiled its earlier attempts to cure the problem of water pollution. Importantly, it is Congress' definition that is controlling, not, as petitioners would have it, the common law definition of traditional navigable waters. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 697-98 n.10 (1995) (looking to the statutory definition of "take" instead of the common law definition). The legislative history strongly confirms Congress' intent that the term "navigable waters" was to be given "the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144 (Sep. 28, 1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. Indeed, even before the 1972 Act, Congress had broad power to regulate "navigable waters," which included nonnavigable tributaries.[8]

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[7] *Id.* 1948 Act, §§ 2(d) and 3(e); 1956 Act §§ 8 and 11(e); 1961 Act §§ 8 and 8(f)(2); *see also* H.R. Rep. 87-306 (Apr. 25, 1961), *reprinted in* 1961 U.S.C.C.A.N. 2076, 2082-84 (definition of "navigable waters").

[8] *See* Section 13 of the Rivers and Harbors Act, also known as the Refuse Act, prohibiting *inter alia*, the "discharge . . . of any refuse matter . . . into any navigable water of the United States, or into any *tributary* of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407 (emphasis added); *see also Oklahoma ex rel. Phillips v. Guy F. Atchison Co.*, 313 U.S. 508, 525 (1941) (Congress' Commerce Clause power also extends to nonnavigable intrastate tributaries which flow into traditional navigable streams).

Further, this Court has repeatedly recognized the comprehensive nature of the Act and its geographic scope. *See, e.g., City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981) (Act was intended to "establish a comprehensive long-range policy for the elimination of water pollution."); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1986) ("While the Act purports to regulate only 'navigable waters,' this term has been considered expansively to cover waters not navigable in the traditional sense.").

In the seminal case of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (Riverside Bayview), the Court, after thoroughly examining the text, purpose, and history of the Act, reached the unanimous conclusion that Congress intended "to repudiate limits that had been placed on federal regulation by earlier pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." The Court reaffirmed *Riverside Bayview's* core holding in *Solid Waste Auth. of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).[9]

II. *RIVERSIDE BAYVIEW* UPHELD THE AGENCIES' INTERPRETATION THAT "WATERS OF THE UNITED STATES" INCLUDES TRIBUTARIES AND ADJACENT WETLANDS

Petitioner Rapanos contends that the decisions in *Riverside Bayview* and *SWANCC* establish a "strict significant nexus" requirement that can only be satisfied if wetlands "actually abut and are inseparably bound up with a traditional navigable water." (Rapanos Br., 16). Petitioner Carabell contends that *Riverside Bayview* and *SWANCC* together stand for the proposition that the Corps must establish a "continuous hy-

[9] As explained in II. B., *infra*, *SWANCC*'s holding that certain "isolated" waters were not within the Act's scope is inapposite given the facts presented here.

drological connection," via surface or groundwater, between a wetland and a navigable water before it can assert jurisdiction. (Carabell Br., 23-28). Petitioners misconstrue both decisions.

A. *Riverside Bayview*

As framed by the Court, the issue in *Riverside Bayview* was whether the Corps had authority to require landowners to obtain permits "before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries.*" 474 U.S. at 123 (emphasis added). The Court answered in the affirmative: "We are thus persuaded that the language, policies and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States'." *Id.* at 139. The Court specifically found that Congress intended the term "waters of the United States" to be given broad geographic scope because "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution" at the source. *Id.* at 132-33.

Petitioners, however, seize on the fact that the wetland at issue in *Riverside Bayview* was adjacent to a navigable creek that flowed into Lake St. Clair, and attempt to draw two untenable inferences. First, Rapanos argues that the Court's holding must be limited to wetlands that "immediately abut" navigable waters. However, a careful reading of the Court's rationale rebuts this suggestion.

The threshold question in *Riverside Bayview* was whether the EPA and Corps regulations defining "waters of the United States" to include wetlands was a reasonable interpretation of the statute.[10] The regulations in existence at the time covered

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[10] As the Court noted: "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters'. Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404 nor to the realities

the entire tributary system of navigable waters, including "primary, secondary and tertiary" tributaries and wetlands adjacent thereto.[11] Significantly, the Court acknowledged that the regulations "include not only navigable waters but also tributaries of such waters, interstate waters and their tributaries, and *nonnavigable intrastate waters whose use or misuse could affect interstate commerce.*" 474 U.S. at 123 (emphasis added). Moreover, the Court took note of the fact that Congress had rejected proposals in 1977 to overturn these regulations by restricting the scope of section 404 to "waters navigable in fact *and their adjacent wetlands.*" 474 U.S. at 137 (emphasis original). Instead, Congress "acquiesced in the Corps' definition of waters as including adjacent wetlands." *Id.* at 138. Finally, the Court stated "we therefore conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to *other bodies of water over which the Corps has jurisdiction* is a permissible interpretation of the Act." *Id.* at 135 (emphasis added).

In sum, the *Riverside Bayview* decision cannot fairly be read as establishing a categorical rule that wetlands must "immediately abut" a traditional navigable water. To the contrary, the Court issued a broad ruling that the Corps had authority to regulate adjacent wetlands as a special jurisdictional class of "waters of the United States." *Id.* at 139 ("The regulation in which the Corps has embodied this interpretation by its terms includes the wetlands on respondent's property *within the class of waters* that may not be filled without a permit.") (emphasis added).

Second, Carabell stretches too far in suggesting that the *Riverside Bayview* Court conditioned its holding on proof of a hydrological connection between the adjacent wetland and

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of the problem of water pollution that the Clean Water Act was intended to combat." 474 U.S. at 132.

[11] *See* 33 C.F.R. § 209.120(e)(2)(c); 40 Fed. Reg. 31,320 (July 25, 1975) (since recodified at 33 C.F.R. § 328.3).

a navigable water body. Contrary to Carabell's assertion (Carabell Br., 25 n.3), the District Court in *Riverside* did not find a direct hydrological connection between the wetland and Lake St. Clair. At most, according to the Sixth Circuit opinion, the record showed that there was "periodic" flooding of the wetland.[12] More significantly, the *Riverside Bayview* Court specifically rejected the argument, on which the Sixth Circuit had relied, that a wetland must be "frequently flooded" by a navigable water in order to be considered a "water of the United States." 474 U.S. at 129. Indeed, the Court said that "wetlands that are not flooded by adjacent waters may still tend to drain into those waters." *Id.* Moreover, the Court noted that Congress singled out wetlands for special protection because of the important functions they perform including filtering pollutants, slowing runoff, controlling flooding, and providing feeding, spawning, rearing and resting areas for aquatic species. *Id.* at 134. As discussed in III. B., *infra*, these functions do not depend on whether there is a "physical connection" between the wetland and the adjacent water body.

Finally, petitioners misread the *Riverside Bayview* Court by suggesting that its use of the term "open waters" implied "traditional navigable waters." (Rapanos Br., 13; Carabell Br., 25-26) Petitioners cite a footnote in which the Court reserved the question of "the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." 474 U.S. at 131 n.8. However, as the Solicitor General has pointed out, "when that footnote is read in context it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability." *See* Brief for the United States in Opposition to the Petition for

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[12] *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 321, 396-97 (6th Cir. 1984).

Certiorari, 15. Moreover, petitioners' argument that "open waters" is synonymous with "navigable waters" conflicts with *Riverside Bayview's* clear holding that "a definition of waters of the United States encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. More plausibly, the Court used "open waters" as shorthand for "rivers, streams, and other hydrographic features more conventionally identified as 'waters'," to distinguish them from wetlands areas such as "shallows, marshes, mudflats, swamps and bogs." 474 U.S. at 131-32.

B. *SWANCC* REAFFIRMED *RIVERSIDE BAYVIEW*

Just as *Riverside Bayview* recognized the breadth of the Act's geographic scope, *SWANCC* noted its limits. In *SWANCC* the Corps asserted jurisdiction over an abandoned sand and gravel pit on the sole basis that it had become habitat for migratory birds. 531 U.S. at 171-72. Noting that the pit was a "nonnavigable, intrastate, isolated" body of water, the *SWANCC* Court rejected this construction of the statute, reasoning that if use by migratory birds was all it took to turn an isolated pond into a water of the United States, then the word "navigable" in the statute would be rendered superfluous. *Id.* at 172. While acknowledging *Riverside Bayview's* observation that the word "navigable" was "of limited import," the *SWANCC* Court said, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.* The Court clearly differentiated the case before it from *Riverside Bayview*: "We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes:* holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171-72.

SWANCC did not, as petitioners seem to suggest, implicitly overrule *Riverside Bayview* by making navigability rather than protection of aquatic ecosystems the touchstone for determining Clean Water Act jurisdiction. The ruling in *SWANCC* was quite narrow: "We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' exceeds the authority granted to respondents under § 404(a) of the CWA." *Id.* at 174 (citation omitted). Thus, *SWANCC* invalidated the Corps' application of its regulations to isolated ponds based exclusively on migratory bird use.[13] The Court did not invalidate the regulations themselves, nor did it make any ruling on the adjacency issues presented here.

The cases at bar are easily distinguished from *SWANCC*. First, these cases deal with wetlands adjacent to nonnavigable tributaries, not isolated, artificial ponds with no connection of any kind to any other body of water. Second, unlike gravel pits, these wetlands provide the specific functions that help maintain the chemical, physical, and biological integrity of the adjoining waters as well as the larger aquatic ecosystems.[14] Third, the Corps based its jurisdictional determinations on the hydrological and ecological relationships of these wetlands to the adjoining water bodies and the downstream navigable waters, not simply on migratory bird habitat.[15]

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[13] The "Migratory Bird Rule" was not a published rule; it refers to language in the preamble to the 1986 revision of the Corps' regulations meant to "clarify" the reach of jurisdiction over intrastate waters used by migratory birds. *See SWANCC*, 531 U.S. at 164.

[14] These functions include flood peak diminution and water quality enhancement through sediment trapping and nutrient recycling. JA Vol. II at 684-86 (testimony of Dr. Willard). They also support the larger aquatic ecosystem, including carp spawning ground, *Id.* at 516-17 (testimony of Dr. Harrington), and other vegetation and wildlife habitat. *Id.* at 557-58 (testimony of Dr. Goff).

[15] The Corps' determinations in this case rested on the general adverse effects on the aquatic ecosystem and downstream waters, including major,

With regard to the Rapanos property, it is undisputed that the wetlands are hydrologically connected to the adjacent tributaries, which ultimately flow into Lake Huron.[16] In Carabell, the record shows that the wetland is not "isolated" despite the existence of a manmade "berm" separating it from a ditch that connects to a tributary that flows into Lake St. Clair.[17] In both cases the wetlands are "inseparably bound up" with tributaries that affect the chemical, physical, and biological integrity of traditional navigable waters. *See United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003), *cert. denied*, 541 U.S. 972

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long term, negative impacts on water quality, as well as impacts upon the ecological balance and integrity of forested wetland cover areas and floodplains, in addition to the impacts upon a migratory bird stopover and foraging point. JA Vol. 1 at 111, 116, 126 (Dept. of the Army Permit Evaluation, File No. 99-250-002-1).

[16] The wetlands at the Salzburg site are connected by a drain to Hoppler Creek which flows into the Kawkawlin River, which flows into Saginaw Bay in Lake Huron. JA Vol. I at 249 (testimony of Drs. Willard and Goff). The Hines site has a surface water connection to the Rose Drain which is connected to the Tittabiwasse River which empties into Saginaw Bay. *Id.* The Pine River site is connected by surface water flow to the nearby Pine River which flows into Lake Huron. JA Vol. I at 271.

[17] Carabell's property is in the shape of a right triangle, which is bordered by an unnamed ditch. JA Vol. 1, at 37 (Carabell Permit Application). The record indicates that this ditch was created to drain the wetland on petitioner's property. JA Vol. 3 at 571-72 (Administrative Appeal Decision). When the ditch was excavated from the wetland, the excavated spoil was placed alongside the ditch to create an artificial berm. *Id.* Army Corps regulations provide that the existence of a man-made spoil berm does not eliminate the adjacency between this wetland and the navigable waters beyond. 33 C.F.R. § 328.3(c); JA Vol. 3 at 570. Though the berm limits surface water flow to the ditch, JA Vol. 1 at 110 (Dept. of the Army Permit Eval.), it cannot eliminate sub-surface flow. Water also flows from the wetland via drainage cuts in the ditch. JA Vol. 3 at 639: 16-23 (Wetland Application Hearing, Testimony of Timothy Stoepker). Water that enters the unnamed ditch flows into the Sutherland-Oemig Drain and eventually the Auvase Creek and Lake St. Clair. JA Vol. 1 at 107 (Dept. of the Army Permit Eval.); JA Vol. 3 at 571-72 (Admin. Appeal Decision).

(2004) ("discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters.") (Deaton); *accord, United States v. Gerke Excavating Inc.*, 412 F.3d 804, 807 (7th Cir. 2005) (Gerke); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001) (Headwaters).

Contrary to Rapanos' contention, *SWANCC* does not categorically prohibit federal regulation of wetlands that do not immediately abut a traditional navigable water. Nor is it reasonable to infer such a rigid rule from the *SWANCC* Court's reference to what it called the "significant nexus" test employed in *Riverside Bayview*. Indeed, the *Riverside Bayview* Court made it clear that a broad, ecological test for the Act's jurisdiction was more appropriate than one based strictly on navigability. 474 U.S. at 134 ("water moves in hydrologic cycles," and pollution of waters that do not themselves meet traditional tests of navigability "will affect the quality of the other waters within that aquatic system.").

Similarly, Carabell is incorrect in asserting that *SWANCC* "repudiated the proposition that federal jurisdiction could be based solely on an ecological connection between a wetland and a navigable water." (Carabell Br., 28). The question in *SWANCC* was whether migratory bird habitat by itself was a sufficient basis on which to regulate an isolated, artificial pond. The question here is whether the Corps made a reasonable determination, based on the best available information, that the wetlands on Carabell's property are hydrological and ecologically connected, via surface and groundwater, to Lake St. Clair. The record shows that the Corps' decision was not arbitrary and it should therefore be upheld. *See City of Shoreacres v. Watterworth*, 420 F.3d 440, 446 (5th Cir. 2005) ("The Corps generally has broad discretion to decide whether a sufficient hydrological nexus exists to bring wetlands under regulatory control.").

III. THE AGENCIES' INTERPRETATION OF "WATERS OF THE UNITED STATES" IS BASED ON SOUND SCIENCE AND POLICY CONSIDERATIONS

A. Jurisdictional Determinations Must Be Made Within a Watershed Context That Takes Account of the Vital Role of Headwaters and Associated Wetlands

A watershed is composed of rivers, streams, lakes, wetlands and estuaries in a treelike pattern with the leaves and twigs (first and second order streams, ditches, and wetlands) at the top of the tree forming the headwaters of a watershed linked by branches (tributaries of ever-increasing size) that reach to the trunk of the tree (mainstem) and extend to the roots (estuary). Like a tree, each part of the watershed performs specific roles or functions that cannot be performed by other parts of the tree. Eliminating and altering small streams, ditches, and wetlands have impacts similar to stripping the outermost leaves and twigs from a tree. Small alterations have little impact, but many alterations in aggregate severely impair the overall health of the tree. Over the past 200 years half the wetlands in the United States have been drained or filled, and millions of miles of streams and rivers have been straightened and altered.[18]

Headwaters serve as a key transitional area between land and water resources because they collect water, sediment, energy, and chemicals from the surrounding landscape and deliver them to the larger streams, rivers, lakes, estuaries, and oceans downstream, linking the terrestrial habitats in the upper watershed with the aquatic habitats in the lower watershed.[19]

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[18] *See* Thomas E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997*, 9 (U.S. Fish & Wildlife Service 2000).

[19] Morrice, J.A., H.M. Valett, C.N. Dahm and M.E. Campana. 1997. *Alluvial characteristics groundwater-surface water exchange and hydrological retention in headwater streams.* Hydrological Processes 11:253-

This happens because water moves slowly through these areas allowing these chemical processes to work. Headwaters also regulate salinity and fertility of estuaries and coastal areas.[20] Consequently, a close connection exists between the water quality of the headwater streams and the water quality of downstream water bodies.[21]

B. Headwaters and Adjacent Wetlands Provide Irreplaceable Ecosystem Services That Support Many Beneficial Uses of Navigable Waters

Headwater streams and associated wetlands affect hydrology, geomorphology, and biological conditions in downstream reaches, including navigable waters.[22] Functions of headwater streams include but are not limited to: regulation of sediment export, retention of nutrients, maintenance of water quality characteristics, processing of terrestrial organic matter, and maintenance of natural discharge patterns.[23] The following list further summarizes the functions and values of headwater streams.

Sediment Control Headwaters and associated wetlands reduce the amount of sediment delivered to downstream waters

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267; Wipfli, M.S. and D.P. Gregovich. 2002. *Export of invertebrates and detritus from fishless headwater streams in southeastern Alaska: Implications for downstream salmonid production.* Freshwater Biology 47(5): 957-969(13).

[20] National Research Council. 1995. Wetlands: Characteristics and Boundaries. National Academy Press, Washington, D.C., p. 287.

[21] State of Ohio Environmental Protection Agency. 2003. *Nonpoint source impacts on primary headwater streams, at* http://www.epa.state.oh.us/dsw/wqs/headwaters/HWH_nonpoint_jan2003.pdf (accessed Jan. 5, 2006) (hereafter, Ohio EPA 2003).

[22] Gomi, T., R. C. Sidle and J. S. Richardson. 2002. *Understanding processes and downstream linkages of headwater systems.* BioScience 52:905-916.

[23] Lowe, W. H. and G. E. Likens. 2005. *Moving headwater streams to the head of the class.* BioScience 55:196-197, p. 196.

by stabilizing stream banks to reduce bank erosion and filtering sediment from water and runoff.[24] This overall reduction in sediment decreases the need for and cost of dredging in downstream waterways while lowering flood frequency, water treatment costs, and deposition in downstream habitats.[25] Each year the Corps of Engineers and contractors spend more than $500 million annually on maintenance dredging of navigable waters.[26]

Pollutant Control The smallest streams are responsible for most nutrient removal.[27] Headwaters and associated riparian buffers reduce the amount of nutrients and other pollutants delivered to downstream waters by filtering them from water and runoff.[28] Nutrients are removed from streams by biotic and abiotic (e.g. physical or chemical) processes; headwaters are more efficient at nutrient transformation and removal, which reduces nutrient loading in downstream ecosystems and improves water quality.[29] This overall reduction in pollutants decreases the cost of water treatment, the

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[24] Dieterich, M. and N.H. Anderson. 1998. *Dynamics of abiotic parameters, solute removal and sediment retention in summer-dry headwater stream of Western Oregon.* Hydrobiologia 379:1-15.

[25] Ohio EPA 2003.

[26] National Academy of Sciences, "Sedimentation Control to Reduce Maintenance Dredging of Navigational Facilities in Estuaries" (1987).

[27] Meyer, J.L. and J.B. Wallace. 2001. *Lost linkages in lotic ecology: Rediscovering small streams.* Ecology: Achievement and Challenge (M.C. Press, N.J. Huntly and S. Levin eds., Blackwell Science), at 310.

[28] Hall, K.J., and B.C. Anderson. 1988. *The toxicity and chemical composition of urban stormwater runoff.* Canadian Journal of Civil Engineering 15:98-106; Lieb, D.A., and R.F. Carline. 2000. *Effects of urban runoff from a detention pond on water quality, temperature and caged Gammarus minus (Say) (Amphipoda) in a headwater stream.* Hydrobiologia 441 (1/3):107-116; Alexander, R.B., R.A. Smith and G.E. Schwarz. 2000. *Effect of stream channel size on the delivery of nitrogen to the Gulf of Mexico.* Nature 403:758-761.

[29] Meyer and Wallace 2001, at 309.

degradation of downstream water quality, and the risks to human health and aquatic life while improving recreational opportunities such as fishing.[30]

Fish and Wildlife Habitat Headwaters and associated riparian buffers provide habitat and protection for wildlife, fish, and other organisms living in and near the stream. They also serve as migratory corridors for birds and fish. These areas can improve or maintain biological integrity, stabilize stream banks, and control water temperatures in the downstream system. They also provide recreational hunting and fishing opportunities and aesthetic enjoyment and may increase property values.[31] Degradation of headwater streams reduces biological diversity and threatens the survival and recovery of endangered species.[32]

Water Supply Headwaters serve as a source of water for downstream water bodies, helping to maintain base flow in the larger streams and rivers in times of drought. They also may be sources of high quality drinking water in some areas.[33] Over 185 million people are served by over 14,000 public water systems using streams, rivers, lakes, tributaries and surface-water storage impoundments.[34] Discharge of agricultural, industrial, sanitary or other waste into any surface water poses a public health risk downstream: excessive upstream discharge may overwhelm a public water system filtration unit, allowing microbial pathogens into the drinking water

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[30] Ohio EPA 2003.

[31] Ohio EPA 2003.

[32] Meyer and Wallace 2001, at 310.

[33] Ohio EPA 2003.

[34] U.S. Environmental Protection Agency. 2005. FACTOIDS: Drinking Water and Ground Water Statistics for 2004. Safe Drinking Water Information System (SDWIS), *at* http://www.epa.gov/safewater/data/pdfs/data_factoids_2004.pdf (accessed Jan. 5, 2006).

system.[35] Disease outbreaks attributed to drinking water treatment plant failures have been documented.[36] EPA's Science Advisory Board cited drinking water contamination by pathogens as one of the most important environmental risks.[37] Drinking water treatment to address microbial pathogens has little effect on many toxic chemicals, metals and pesticides discharged into drainage ditches, canals or other surface waters.[38]

Flood Control Headwaters are closely connected with groundwater, wetlands, and subsurface water flows, and are important in regulating the flow of water into downstream water bodies. A healthy network of headwater streams can regulate baseflow of downstream water bodies, thereby reducing local and downstream flooding, mitigating low flow and high flow extremes, and preventing excess erosion caused by flooding.[39] The destruction of small streams, such as headwaters and intermittent or ephemeral waters, can increase the flood frequency in the watershed and change water flow patterns.[40] Increases in flood frequency results in increases in bank erosion, channel widening, and channel incision.[41]

C. Over Forty Percent of the Wastewater Discharges Authorized Under the Act, Excluding Alaska, Are Located in Headwaters.

According to a recent EPA estimate, over forty percent of the discharges authorized under section 402 of the Act, out-

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[35] Novotny, V. 2002. Water Quality: Diffuse Pollution and Watershed Management (2nd Ed.). John Wiley & Sons, Inc., New York, NY.

[36] Craun, G.F., F.S. Hauchman and D.E. Robinson (eds.). 2001. Microbial Pathogens and Disinfection By-Products in Drinking Water: Health Effects and Management of Risks. ILSI Press, Washington, DC.

[37] 68 Fed. Reg. 47,646. (Aug. 11, 2003).

[38] Novotny 2002.

[39] Ohio EPA 2003.

[40] Meyer and Wallace 2001, at 307.

[41] *Id.*

side of Alaska, are into headwater streams including intermittent and ephemeral streams. *See* Appendix A, at 2.[42] Of these discharges, approximately 28% are from municipal sewage treatment systems. The other 72% include an array of discharges from over 500 industrial categories, ranging from elementary and secondary schools to petroleum refining to industrial organic chemical facilities. *Id.*

Limiting the jurisdiction of the Act to traditional navigable waters and adjacent wetlands would exclude a substantial number of discharges from its coverage.

D. Over Ninety Percent of the Surface Water Intakes for Public Drinking Water Systems Are Located in Headwaters.

EPA also estimates that over ninety percent of the identified source water protection areas, where the surface water intakes for public water supply systems are located, contain intermittent, ephemeral, or headwater streams. *See* Appendix A, at 2. EPA estimates that the public systems that use these intakes (as well as other sources) provide drinking water to over 110 million people. *Id.*

Limiting the jurisdiction of the Act to traditional navigable waters and adjacent wetlands could jeopardize these vital public drinking water supplies.

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[42] This is a conservative estimate that may actually understate the number of discharges to nonnavigable waters. According to one reputable study, approximately 73% of the nation's waters are nonnavigable. Leopold, L.B., M.G. Wolman, and J.P. Miller, Fluvial Processes in Geomorphology. W.H. Freeman and Company, San Francisco (1964). The EPA estimate uses data on intermittent and ephemeral streams as proxies for nonnavigable tributaries. The EPA relies on such data because it can be correlated with data on discharge permits and water intake structures, resulting in a conservative approximation of the number of discharges and intake structures that would be found in nonnavigable tributaries. *See* http://aswm.org/swp/headwaters.htm (accessed Jan. 10, 2006).

IV. LIMITING THE GEOGRAPHIC SCOPE OF THE ACT TO TRADITIONAL NAVIGABLE WATERS AND ADJACENT WETLANDS WILL UNDERMINE EFFORTS AT ALL LEVELS OF GOVERNMENT TO PROTECT AND RESTORE AQUATIC ECOSYSTEMS OF NATIONAL SIGNIFICANCE

Within the Act's comprehensive framework, federal, state, tribal and local governments have initiated a variety of cooperative, intergovernmental efforts to protect and restore ecosystems of national significance. These include the Great Lakes,[43] Chesapeake Bay,[44] and Long Island Sound.[45] While states have played important roles in each of these efforts, the regulatory jurisdiction of EPA and the Corps of Engineers over tributaries and wetlands has been crucial to pollution control and restoration efforts.

The phenomenon of the "dead zone" in the Gulf of Mexico illustrates how the degradation of headwaters streams and wetlands can have dramatic negative effects on navigable waters hundreds or thousands of miles away. The "dead zone"

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[43] 33 U.S.C. § 1268(a) (creating the Great Lakes program and directing EPA to "take the lead" in the effort to meet water quality goals "working with other Federal agencies and State and local authorities."). A description of the Great Lakes Program is available at http://www.epa.gov/glnpo/ (accessed Jan. 5, 2006).

[44] 33 U.S.C. § 1267(a) (establishing the Chesapeake Bay Program with a goal of "restoring and protecting the Chesapeake Bay ecosystem and the living resources."). A description of the Chesapeake Bay Program is available at http://www.chesapeakebay.net/ (accessed Jan. 5, 2006).

[45] 33 U.S.C. § 1369 (establishing the Management Conference of the Long Island Sound Study). The Long Island Sound Study was formed in 1985 by EPA, New York, and Connecticut, as a bi-state partnership consisting of federal and state agencies, user groups, concerned organizations, and individuals dedicated to restoring and protecting the Sound. Information available at http://www.epa.gov/region01/eco/lis/epane.html (accessed Jan. 5, 2006).

refers to a condition known as hypoxia where oxygen levels are too low to support aquatic life. The source of the dead zone is the polluted water of the Mississippi River. The dead zone in the Gulf of Mexico is the world's second largest oxygen-depleted coastal water.[46] It varies in size from year to year but has covered an area equal to Massachusetts and New Jersey. Scientists have linked this condition to wetland destruction throughout the Mississippi River watershed.[47]

The Upper Mississippi River system includes the Upper Mississippi, Illinois, Minnesota, St. Croix, Black and Kaskaskia Rivers. These rivers drain an area of 190,000 square miles in Minnesota, Wisconsin, Iowa, Illinois, Iowa, and Missouri and a small portion of Indiana and South Dakota. Only about 1300 miles—less than 1% of the entire hydrologic system—are navigable. The rest of the system consists of nonnavigable tributaries, ditches and wetlands. These tributaries, ditches, and wetlands contribute to the base flows of the navigable portions of the system. The tributaries and ditches carry large amounts of nutrients and sediment—particularly nitrogen—into the navigable waters which create the dead zone.

Wetlands and headwaters in the upper Mississippi watershed serve as nutrient "sinks." The filling of these wetlands therefore results in rapid transmission of agricultural fertilizers in storm runoff into the mainstem of the Mississippi system: the loss of 80% of riparian wetlands in the Midwest has increased the amount of nitrogen entering the Gulf by three-

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[46] Larsen, J. 2004. *Dead Zones Increasing in World's Coastal Waters.* Eco-Economy Update (June 16, 2004), *available at* http://www.earth-policy.org/Updates/Update41.htm (accessed Jan. 5, 2006).

[47] Mitsch, W.J., J.W. Day Jr., J.W. Gilliam, P. Groffman, D.L. Hey, G.W. Randall and N. Wang. 2001. *Reducing nitrogen loading to the Gulf of Mexico from the Mississippi River basin: Strategies to counter a persistent ecological problem.* BioScience 51:373-388.

fold over the past 40 years.[48] Eight-five percent of nitrogen arriving at the hypoxic zone in the Gulf originates in the upper Mississippi (north of Cairo, Illinois).[49] At the mouth of the Mississippi, pulses of nitrogen and phosphorus originating in northern Minnesota, western Montana, and eastern Ohio (from as far as 1,700 linear miles away) converge to feed massive algal blooms which consume all available oxygen.[50] This phenomenon has resulted in the devastation of commercial and recreational fisheries in the northern Gulf of Mexico.[51]

V. THE AGENCIES' INTERPRETATION OF "WATERS OF THE UNITED STATES" AS INCLUDING WETLANDS ADJACENT TO TRIBUTARIES IS ENTITLED TO *CHEVRON* DEFERENCE

A. The Interpretation Is Well Within the Limits of the Commerce Clause

Regulation of these wetlands under the Act is clearly authorized by the Commerce Clause, either as regulation of the "channels of interstate commerce" or as regulation of a class of activities that substantially affects interstate com-

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[48] *Id.*; Rabalais, N.N., R.E. Turner and D. Scavia. 2002. *Beyond science into policy: Gulf of Mexico hypoxia and the Mississippi River*. BioScience 52(2):129-142.

[49] Goolsby, D.A., W.A. Battaglin, G.B. Lawrence, R.S. Artz, B.T. Aulenbach, R.P. Hooper, D.R. Keeney and G.J. Stensland. 1999. *Flux and Sources of Nutrients in the Mississippi–Atchafalaya River Basin: Topic 3 Report for the Integrated Assessment on Hypoxia in the Gulf of Mexico.* NOAA Coastal Ocean Program Decision Analysis Series No. 17. NOAA Coastal Ocean Program, Silver Spring, MD, *available at* http://www.nos.noaa.gov/Products/hypox_t3final.pdf (accessed Jan. 5, 2006).

[50] CENR. 2000. "Integrated Assessment of Hypoxia in the Northern Gulf of Mexico." National Science and Technology Council Committee on Environment and Natural Resources, Washington, D.C.

[51] *Id.*

merce. *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2005) (Gonzales); *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942).[52]

The Court's task in reviewing the petitioners' Commerce Clause challenge is modest, as federal legislation is accorded a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607 (2000). The Court "need not determine whether [petitioners'] activities, taken in the aggregate, substantially affect interstate commerce, but only whether a 'rational basis' exists for so concluding." *Gonzales*, 125 S.Ct. at 2197 (*citing United States v. Lopez*, 514 U.S. 549, 557 (1995)). That test is easily satisfied here.

Although petitioners focus their constitutional argument on section 404(a) of the Act, the appropriate question to ask is whether the activities regulated by section 301 of the Act,[53] point source discharges of pollutants into navigable waters, substantially affect interstate commerce. While section 404(a) authorizes the issuance of permits for discharges of dredged and fill material into navigable waters, it is section 301 that prohibits those discharges as well as discharges of pollutants in general. When viewed in its proper context, the question is an easy one.

This case does not involve the regulation of noneconomic, criminal conduct, like the activities in *Lopez*, 514 U.S. at 561, or *Morrison*, 529 U.S. at 613. The discharges of pollutants into navigable waters are caused primarily by industrial and commercial operations.[54] Indeed, one of the policies that motivated passage of the Act in 1972 was Congress' desire to end the use of the nation's rivers, lakes, streams, and oceans as "waste treatment systems."[55]

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[52] The "channels of interstate commerce" argument is addressed in the Respondent's brief and will not be repeated here.

[53] 33 U.S.C. § 1311.

[54] Indeed, the activities of the petitioners were clearly economic activities.

[55] S. Rep. No. 92-414 (Oct. 28, 1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

Unlike the *Lopez* and *Morrison* cases, there is a clear and direct connection between point source discharges of pollutants into navigable waters and interstate commerce. Surface waters provide drinking water for approximately half of the country[56] and about 9 trillion gallons of fresh water are used each year to manufacture goods.[57] Americans spend about 44 billion dollars each year on trips to coastal areas; the American fishing industry produces more than 10 billion pounds of fish and shellfish each year; and farmers, who produce food and fiber products worth 197 billion dollars per year, rely heavily on irrigation.[58] Point source discharges contribute to surface water pollution and reduce opportunities to use those waters as drinking water sources or for recreational purposes; harm many plants and animals that may be articles of commerce; increase flooding, which impedes navigation and can have other clear effects on interstate commerce; and destroy the habitat of endangered and threatened plant and animal species.[59]

Although there may be individual instances in which discharges of pollutants, including dredged material, into navigable waters, do not substantially affect interstate commerce, this Court has held that "[w]here a general regulatory scheme

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[56] U.S. EPA. 1996. *Liquid Assets: A Summertime Perspective on the Importance of Clean Water to the Nation's Economy.* EPA-800-R-96-002. Office of Water (4101), United States Environmental Protection Agency, Washington, D.C., at 10.

[57] U.S. EPA. 2000. *Liquid Assets 2000: America's Water Resources at a Turning Point.* EPA-840-B-00-001. Office of Water (4101), United States Environmental Protection Agency, Washington, D.C., at 2, *available at* http://www.epa.gov/water/liquidassets/assets.pdf (accessed Jan. 5, 2006).

[58] *Id.* at 6-7.

[59] *See* U.S. EPA, *A Benefits Assessment of Water Pollution Control Programs Since 1972: Part 1, The Benefits of Point Source Controls for Conventional Pollutants in Rivers and Streams* (January 2000), *available at* http://www.epa.gov/ost/economics/assessment.pdf (accessed Jan. 5, 2006).

bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (citation omitted). Regulation of those intrastate activities is appropriate when the activity is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at. 561; *see also Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981).[60]

As described in Section III.B., *supra*, regulation of discharges of dredged or fill material into wetlands that are adjacent to nonnavigable tributaries of traditionally navigable waters is an essential part of Clean Water Act section 301 regulation, as the wetlands provide irreplaceable ecosystem services that support beneficial uses of navigable waters.[61]

Furthermore, this case does not upset a balance between the state and federal governments regarding the regulation of land and water uses. As this Court has noted, the Act "involves [a] complex statutory and regulatory scheme . . . that implicates both federal and state administrative responsibilities." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). Further, this Court has long recognized that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation

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[60] While this Court has identified a "jurisdictional limit" as one factor to consider in determining whether a statute falls within Congress' Commerce Clause power, the Court has never required Congress to include such a provision in a statute. Indeed, just last term, the Court upheld, against a Commerce Clause challenge, the application of the federal Controlled Substances Act (CSA), without identifying a jurisdictional limit in the CSA. *Gonzales, supra*.

[61] Even if it were not an essential part of the section 301 program, regulation of discharges of dredged or fill material into wetlands that are adjacent to nonnavigable tributaries of traditionally navigable waters could be justified as regulation of a class of activities that, in the aggregate, substantially affects interstate commerce.

of activities causing air or water pollution, or other environmental hazard." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981).[62]

Since point source discharges of pollutants into navigable waters have a substantial effect on interstate commerce and regulation of the wetlands in these cases is an essential part of the regulation of that class of activities, the regulation is clearly authorized under the Commerce Clause.

B. The Weight of Authority Supports the Agencies' Interpretation

From the earliest cases interpreting the Act, courts have recognized the logic of including tributaries within its geographic scope. As the Sixth Circuit stated in one of the first enforcement cases:

> It would, of course, make a mockery of those powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974).

The courts have also consistently rejected petitioners' argument that ditches, many of which were once natural streams, should not be treated as tributaries. As the Eleventh Circuit noted:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural

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[62] *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (State authority over land use control "is shared with the federal government when [it] exercises one of its enumerated powers.").

> routes. The fact that bodies of water are man-made makes no difference. . . That the defendants used them to convey the pollutants without a permit is the matter of importance.

United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997), *cert. denied*, 522 U.S. 899 (1997) (citation omitted).

This trend has continued since the *SWANCC* decision. Five Circuit Courts have ruled on jurisdictional questions similar to those presented here. With the exception of the Fifth Circuit,[63] all have concluded that the Act reaches the kinds of tributaries and adjacent wetlands at issue.[64] The *Deaton* and *Gerke* decisions are particularly informative.

In *Deaton*, the Fourth Circuit held that a wetland adjacent to a roadside ditch that followed a "winding, thirty-two-mile path to the Chesapeake Bay" was subject to the Corps' jurisdiction. The court rejected Deaton's claim that the Corps' interpretation was not entitled to deference because it overran the limits of the Commerce Clause:

> Congress passed the Clean Water Act 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and gave the Corps, along with the Environmental Protection Agency, the job of getting this done. The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters.

Deaton, 332 F.3d at 707 (citation omitted).

In *Gerke*, the Seventh Circuit held that the Corps had jurisdiction over "wetlands . . . drained by a ditch that runs into a

---

[63] *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). As explained in Respondent's brief these cases are distinguishable and not persuasive.

[64] In addition to the Fourth Circuit (*Deaton*) and the Seventh Circuit (*Gerke*), the Ninth Circuit (*Headwaters*) is in agreement with the Sixth Circuit decisions involved here.

nonnavigable creek that runs into the nonnavigable Lemonweir River, which in turn runs into the Wisconsin River, which is navigable." 412 F.3d at 805. In response to Gerke's argument that a ditch is not tributary, the court observed:

> A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart.

Id. at 805-06.

Like petitioners, Gerke tried to argue that *SWANCC* prohibits regulation of wetlands that do not physically abut navigable water. The Seventh Circuit disagreed:

> Gerke fastens on the sentence in the [*SWANCC*] opinion that states that the Clean Water Act does not extend 'to ponds that are not adjacent to open water.' It is dangerous, however, to take judicial language out of context; the case was about a pond that was completely isolated from any navigable waterway, tributary, etc. . . . '[A]djacent' can just mean 'connected,' and 'open water' can just mean water that is part of the waters of the United States because it flows into navigable waterways.

Id. at 808 (emphasis in original) (citations omitted).

Judge Posner also made short work of the claim that the Corps' interpretation raised serious constitutional issues:

> Nothing in the Constitution forbids interpreting the Clean Water Act to cover any wetlands that are connected to navigable waters. Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the Act. *Id.* at 807.

The logic of *Deaton* and *Gerke* applies here as well. Petitioners' wetlands are adjacent to streams and ditches that are

tributaries of traditional navigable waters. The wetlands are integral components of aquatic ecosystems. The fact that these systems have been significantly modified by ditches and berms does not mean that they are no longer "waters of the United States." Indeed, nearly all of the waterways in this country have undergone substantial alterations. If the national goal of restoring these systems is to be realized, it must start by saving the pieces that remain.

CONCLUSION

For the foregoing reasons, and in the interests of continuing the progress the nation has made in restoring and maintaining the integrity of its priceless aquatic ecosystems, Amici respectfully request that the decisions of the Sixth Circuit be affirmed.

Respectfully Submitted,

STEPHEN M. JOHNSON
MERCER UNIVERSITY
SCHOOL OF LAW
1021 Georgia Avenue
Macon, Georgia 31207
(478) 301-2192

Counsel for Amici Curiae Association of State Wetland Managers, et al.

PATRICK PARENTEAU
ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC
VERMONT LAW SCHOOL
PO Box 300
South Royalton, Vermont 05068
(802) 831-1305

Counsel of Record for Amici Curiae Association of State Wetland Managers, et al.

* Counsel wish to acknowledge the contributions of Jason Klotz, third year student clinician, and Justin Kolber, Clinic Fellow, to this brief.

APPENDIX

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 9, 2005

Ms. Jeanne Christie
Executive Director
Association of State Wetland Managers
2 Basin Road
Wjndham, Maine 04062

Dear Ms. Christie:

Thank you for your letter of December 19, 2005, indicating that the Association of State Wetland Managers (ASWM) is developing an amicus brief in support of the federal government in the two cases currently before the U.S. Supreme Court, *Rapanes v. United States* and *Carabell v. U.S, Army Corps of Engineers*. I appreciate ASWM's interest in these important cases.

Your letter requests information on a nationwide scale regarding the extent of nun-navigable tributaries and adjacent wetlands, as well as on the number of drinking water intakes and Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits on such waters. The Environmental Protection Agency (EPA) has received information from the public and conducted its own data search on these and related issues. Much of the data, for example, are extracted from national data sets and compared to information provided to EPA in public responses to the 2003 Advance Notice of Proposed Rulemaking (ANPRM) for the Clean Water Act Regulatory Definition of "Waters of the United States." Most of the data used to conduct these analyses is publicly available. While these data represent a factual summary of information obtained from the public and from gov-

ernment data sets, we have included any appropriate caveats where assumptions have been necessary in order to respond to your specific questions.

Some of the analyses and data are identified below as preliminary because they are still being peer reviewed. Data and analyses reviewed and approved through an outside peer review process include the NHD methodology and analysis using start reaches and intermittent/ephemeral waters as a conservative approximation for "non-navigable" waters, and the location of NPDES dischargers into such waters

The extent of non-navigable tributaries is difficult to estimate nationwide because navigability is not a parameter included in national databases. For example, the publicly available National Hydrology Dataset (NHD) maintained by the U.S. Geological Survey docs not distinguish between navigable and non-navigable waters. Instead, the NHD characterizes stream reaches based on flow characteristics such as perennial and intermittent/ephemeral. We are providing data on the linear extent of intermittent/ephemeral streams and "start reaches," stream segments in the NHD that lie at the head of the tributary system and have no other streams flowing into them, because streams with these characteristics arc likely to be non-navigable waters. We believe that the length of streams in these two categories provides a conservative range of the extent of non-navigable waters in the U.S.

Based on available 1:100,000 scale data from the NHD, we estimate that 53% of stream kilometers (2,915,824 km) in the U.S. outside Alaska are start reaches. Similarly, queries to the NHD indicate that 59% (3,214,641 km) of the total kilometers of streams in the U.S., excluding Alaska, are intermittent/ephemeral. This information suggests that the linear extent of non-navigable waters ranges from between 53%-59% of the total length of streams in the U.S., excluding Alaska. These estimates appear consistent with those submitted by states commenting in response to the ANPRM.

EPA has conducted a preliminary analysis to estimate the number of wastewater sources authorized under the Clean Water Act's Section 402 permits program to discharge into either start reaches or intermittent/ephemeral streams nationwide based on data from the NHD and EPA's national database for the NPDES program, the Permit Compliance System (PCS), excluding Alaska. An analysis of PCS data from June 2004 shows that approximately 85% of the individual permits (approximately 37,000 out or 43,000 permits in PCS at that time) have data necessary for determining the location of discharges with respect to intermittent/ephemeral streams and start reaches. As noted above, these water features from NHD have characteristics of non-navigable waters. EPA estimates that over 40% of the 37,000 permits with locational data discharge into either start reaches or intermittent/ephemeral streams, excluding Alaska. Approximately 28% of these discharges are from municipal sewage treatment systems, systems that treat domestic sewage as well as wastewater from commercial and industrial users. The other 72% include an array of discharges from over 500 industrial categories, ranging from elementary and secondary schools to petroleum refining to industrial organic chemical facilities. The discharges covered by this estimate represent most of the individual discharges but do not include the much larger number of discharges covered by storm water and non-storm water general permits (permits that cover multiple, typically smaller, discharges, for which EPA lacks sufficient locational data). These data also are consistent with data submitted by states commenting in response to the ANPRM.

We have also developed a preliminary estimate of public drinking water system intakes receiving water from start reaches or ephemeral/intermittent streams, based on NHD data and information regarding source water protection areas (SWPAs). Preliminary estimates indicate that over 85% of identified SWPAs (for surface water intakes used us a drinking water source) included start reaches, and approximately

60% contain intermittent/ephemeral streams. In total, over 90% of surface water protection areas contain start reaches or intermittent/ephemeral streams. Public drinking water systems which use these intakes (as well as other sources) are estimated to provide drinking water to over 110 million people. Of the over 14,000 public water supply systems using surface waters, RPA has located (on the NHD) and mapped SWPAs for over 7,400 intakes (excluding Alaska but including Puerto Rico) serving 5,646 public water supply systems. For the purposes of this analysis, SWPAs encompass the drainage area of up to 15 miles upstream from a drinking water intake, and any SWPA that contains at least one start. reach or intermittent/ephemeral stream is included in the count. Please note that this analysis is preliminary, but nonetheless illustrates the important relationship between public health and the water quality of headwater, intermittent, and ephemeral streams.

EPA remains committed to the protection of aquatic resources under the CWA. AS you know, President Bush announced an aggressive new national goal to move beyond no net loss of wetlands in America to achieve an overall increase of the Nation's wetlands. The President's challenge is to restore, improve and protect at least three million additional acres of wetlands over the next five years. For the President's Initiative, EPA committed to restore 6,000 acres of wetlands by 2009 and to improve 6,000 acres of wetlands by 2009. We are currently putting together a tracking and reporting system to measure progress towards these goals.

Thank you again for your interest in these cases. If you have further questions, please feel free to contact me or call Dave Evans, Director of the Wetlands Division, at (202) 566-0535.

Sincerely

/s/ BENJAMIN H. GRUMBLES
Benjamin H. Grumbles
Assistant Administrator

(44) (43)

No. 04-1034 and 04-1384

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In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS;
PRODO, INC.; ROLLING MEADOWS HUNT CLUB;
and PINE RIVER BLUFF ESTATES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* ATTAINABLE HOUSING ALLIANCE IN SUPPORT OF PETITIONERS

SEBASTIAN RUCCI
3058 Chardonnay Lane
Poland, OH 44514
(330) 707-1182

Counsel of Record for Amicus Curiae
Attainable Housing Alliance

Becker Gallagher Legal Publishing, Inc., 800.890.5001

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INTEREST OF THE AMICI CURIAE

The Attainable Housing Alliance has received the parties written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court. Counsel for amicus curiae authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

The Attainable Housing Alliance is an association of over 800 members of the Northern Illinois Home Builders Association, the Home Builders Association of the Greater Fox Valley and the Home Builders Association of Greater Chicago. The Attainable Housing Alliance represents a unified voice of the home building industry of northeastern Illinois on issues that affect the attainability and ownership of housing. The instant case could have a profound impact on the regulation of property in Northern Illinois where much of the land is low lying, and therefore, directly concerns all the members of the Alliance.

SUMMARY OF ARGUMENT

Amici submit that *SWANCC* replaced the "hydrological connection" test with the "significant nexus" test, and submit that the a proper reading of what comprises a substantial nexus under *SWANCC* is found in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *United States v. Needham*, 354 F.3d 340 (5th Cir. 2003) both of which limit hold that a minimal hydrological connection is not sufficient to confer jurisdiction. To reach Clean Water Act jurisdiction over the wetlands over the Rapano's property, the Corps must claim jurisdiction over all tributaries, however trivial or intermittent. The Corps would in effect, regulate all water in every state, because everything above sea level eventually drains into a navigable waterway. This reaches well beyond the significant nexus between the wetlands and 'navigable waters, and substantially altered the meaning of navigable waters as found in the Clean Water Act.

The Clean Water Act is not so broad as to permit the Corps to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters. It is doubtful that Congress authorized the Corps to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters," to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot conceivably apply to a drainage ditch twenty miles removed from a navigable river. This would have far-reaching consequences, and impose severe limitations on a landowner's use of their land.

The term adjacent wetlands as defined by the Corps cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a "significant nexus" between the water in question and the navigable-in-fact waterway. This requires the adjacent body of water be "sufficiently linked" to the navigable-in-fact water. The Carabell property is separated by a man-made berm and is far too attenuated to become waters of the United States within the meaning of the Clean Water Act.

Since the ditch running along the Carabells' property is separated from wetlands only by a man-made berm or barrier. It is logical that this would limit the entrance of any pollution on the property from entering the downstream waters. This would also limit sediment transport from the property to downstream navigable waters. By berming the property a landowner should be able to remove the property from the Corps jurisdiction as this would limit any substantial nexus to the navigable waters. However, the Corps would assert that the manmade berm is jurisdictional. In effect, a landowner is not permitted to enclose the wetlands or creeks on its property. However, if the purpose of the Clean Water Act is to restore and maintain clean water, then this enclosure should be encouraged. Unless the Corps has

converted the Clean Water Act into a wildlife conservation act. If so, this should change should be spelled out by Congress, and not the Corps.

When Congress enacted the Clean Water Act, it attempted to preserve the authority of the States to regulate land use. The Corps regulation prohibit a property owner by enclosing its property from navigable waters which prevents the discharge of pollutants to be controlled at the source by preventing their entry into navigable waters. The severe federal intrusion into areas of traditional state and local control by the Corps is not consistent with Congress' effort to preserve the State land use authority. The Corps usurpation of local land use, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the Clean Water Act, but Congress made explicit in the Act its intention to preserve state and local land use regulation.

The Corps limitless jurisdiction intrudes upon traditional local authority to control the use, development, and preservation of land and water resources that Congress expressly recognized in the Clean Water Act. The Corps regulatory authority under § 404 of the Clean Water Act has limits, and those limits forbid its regulatory authority over the enclosure of small intrastate ditches, miles from navigable waters. The Corps also does not have regulatory authority to regulate the enclosure of property where the runoff does not reach navigable waters.

ARGUMENT

I. THE PROPER JURISDICTIONAL ANALYSIS UNDER THE CLEAN WATER ACT REQUIRES A SIGNIFICANT NEXUS WELL BEYOND THE MOST MINIMAL HYDROLOGICAL CONNECTION.

A. Clean Water Act.

In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event by enacting the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("Clean Water Act"). Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), prohibits "any person" from discharging "any pollutant," including "dredged or fill material," into "navigable waters" without obtaining a permit from the Corps. The Clean Water Act defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). However, "the waters of the United States" is not defined.

The Clean Water Act directs the EPA to adopt guidelines, in conjunction with the Corps, for administering § 404 dredge and fill permits. 33 U.S.C. § 1344(b)(1). The Corps guidelines are codified at 33 C.F.R. Parts 320-29 (2004).[3] The Corps defines the term "waters of the United States" in 33 C.F.R. 328.3(a). The relevant definition include: "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," § 328.3(a)(1); "tributaries of [these] waters," § 328.3(a)(5); and "wetlands adjacent to [these] waters [or their tributaries]," § 328.3(a)(7).

---

[3] The EPA's guidelines under the Clean Water Act are codified at 40 C.F.R. Part 230. Since the EPA and the Corps have identical provisions, citation is only provided to the Corps regulations. Also, all statutory references to C.F.R. are to (2004) unless noted otherwise.

The Clean Water Act defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The phrase "navigable waters" and "waters of the United States" remain closely intertwined, and the tributary of a navigable water is also intertwined with the word navigable waters. The word navigable does not get subsumed by the word tributary. In indicating the reach of the Clean Water Act, Congress used the words "the waters of the United States" as opposed to "all water within the United States." The statutory language carves out a subset of federally regulated waters "the waters of the United States" from the larger set of "all water" within the nation's borders. Though the Clean Water Act uses the phrase "waters of the United States" rather than "navigable waters of the United States," that phrase is used to define the term "navigable waters."

Nonetheless, the Corps has wrenched the word of its plain meaning and stepped outside its statutory boundaries, and has steadfastly expanded its authority under the Act into a mandate to regulate every drop of water in the country.[4]

B. *SWANCC* Requires a Substantial Nexus Beyond a Mere Hydrological Connection.

The Corps jurisdictional expansion was limited to some extent when this Court construed the phrase "the waters of the United States" under the Clean Water Act in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). *SWANCC* created a split among the federal courts as to how the ruling should be interpreted. Some courts have adopted an overly narrow reading allowing the Corps to regulate every drop, while others have properly read *SWANCC* broadly consistent with this Courts opinion.

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[4] Permit applications have involved wetlands as small as 26 square feet, about the size of an office desk. V. Albrecht & B. Goode, *Wetland Regulation in the Real World* 21 (1994).

In *SWANCC* a consortium of municipalities surrounding Chicago sought to build a landfill in land that had been used decades earlier for sand and gravel mining. *Id.* at 163. Once the mining ceased the excavation areas filled with water and became permanent and seasonal ponds. *Id.* The municipalities sought a permit to fill the ponds. *Id.* The Corps denied the permit because the non-navigable and isolated ponds had become the home of migratory birds, and under the Corps "Migratory Bird Rule" the ponds were "waters of the United States" and fell within the Corps jurisdiction. *Id.* at 164-65. This Court explained that a significant nexus must exist between the regulated wetlands and navigable waters:

> It was the **significant nexus** between the wetlands and "navigable waters" that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*. . . . In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to **ponds that are *not* adjacent to open water**. But we conclude that the text of the statute will not allow this.
>
> Indeed, the Corps' *original* interpretation of the [Clean Water Act], promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations . . . emphasized that it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor. . . .
>
> *SWANCC*, 531 U.S. at 167-68 (emphasis added).

The *SWANCC* Court also noted that the "Corps' *original* interpretation" of the Clean Water Act "promulgated two years after its enactment" is much different than the Corps "new regulations." *Id.* at 168. The Court concluded that neither the text of the statute nor its legislative history supported the Corps'

assertion of jurisdiction over the non-navigable ponds. *Id.* at 170-171. The Court also declined to extend the ruling in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) to isolated ponds:

> We thus decline [the Corps] invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. . . . We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import" and went on to hold that § 404(a) extended to **non-navigable wetlands adjacent to open waters**. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what **Congress had in mind** as its authority for enacting the [Clean Water Act]: its traditional **jurisdiction over waters that were or had been navigable in fact** or which could reasonably be so made.
>
> *SWANCC*, 531 U.S. at 171-72 (emphasis added).

The *SWANCC* majority noted that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172. The Court found "nothing approaching a clear statement from Congress" that it intended to reach non-navigable isolated ponds. *Id.* at 174. The Court concluded that 33 C.F.R. § 328.3(a)(3) (1999), as applied to the property pursuant to the migratory bird rule "exceeds the

authority granted to [the Corps] under § 404(a) of the [Clean Water Act]." *Id.* at 174. Since the ponds were not "waters of the United States" the development was allowed to proceed without federal interference. *Id.*

The *SWANCC* dissent points out, that even the most seemingly isolated wetlands are in fact both hydrologically and ecologically connected to navigable waters. *SWANCC*, 531 U.S. at 176 n.2 (Stevens J., dissenting). Nonetheless, the majority still refers to the wetlands as isolated. This leads the majority to conclude that the Corps jurisdiction does not extend to "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 167-68. The dissent cogently, if disapprovingly, described the effect of *SWANCC* in its dissent as follows: "the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters **except for actually navigable waters, their tributaries and wetlands adjacent to each**." *SWANCC*, 531 U.S. at 176-77 (Stevens J., dissenting). The dissent also noted that after *SWANCC* "intermittent rivers, streams, tributaries" that "are not contiguous or adjacent to navigable waters" are outside the scope of the Clean Water Act. *Id.* at 189.

C. Adjacent Wetlands Must Require a Significant Measure of Proximity to Navigable Waters to Confer Clean Water Act Jurisdiction.

Amici submit that *SWANCC* replaced the "hydrological connection" test with the"significant nexus" test. The Sixth Circuit appears to give this lip service. The Sixth Circuit explained in *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004) that Clean Water Act jurisdiction over "adjacent wetlands" requires a significant nexus between the wetlands and navigable waters, "which can be satisfied by the presence of a hydrological connection." However, *Rapanos* Court finds that

even the most minimal hydrological connection between that water and navigable waters is sufficient to confer jurisdiction. The Sixth Circuit has reinserted the hydrological connection test by holding that a hydrological connection confers a significant nexus.

This Court should reject the Sixth Circuit's view that even the most minimal hydrological connection between that water and navigable waters is sufficient to confer jurisdiction. The Fifth Circuit has lead the charge in applying a proper reading of what comprises a substantial nexus under *SWANCC*. In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) the court addressed whether an oil company was liable for the damage to the plaintiffs land from a series of small "discharges that occurred over a considerable period of time" by "ground and surface waters" into "a small seasonal creek" which runs into a navigable river. *Id.* at 265.

The *Rice* Court address groundwater and surface water separately, and found that "ground waters are not protected waters under" the Clean Water Act. *Id.* at 269 (citation omitted). With regards to surface waters the court relied on *SWANCC* to conclude "a body of water is subject to regulation under the [Clean Water Act] if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269 (citing *SWANCC*, 531 U.S. at 680). The court noted that the streams the plaintiff sought to protect were "intermittent streams which only infrequently contain running water" and often have "no running water at all." *Id.* at 270.

The *Rice* Court found a lack of evidence that the non-navigable creek is "**sufficiently linked** to an open body of navigable water" to permit jurisdiction, and it would be an "unwarranted expansion" to apply jurisdiction to intermittent streams. *Id.* at 271. The court also found a lack of "evidence of a close, direct and proximate link between" the discharges and

"any resulting actual, identifiable" contamination of a "particular body of natural surface water that satisfies the jurisdictional requirements." *Id.* at 272.

The Fifth Circuit continued its proper reading of *SWANCC* in *United States v. Needham* (*In re Needham*), 354 F.3d 340 (5th Cir. 2003) where oil was "discharged into the drainage ditch" that spilled into a tributary that flows into an "industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The trial court found that the "neither the drainage ditch" nor the tributary are navigable waters and not "sufficiently adjacent to the navigable waters" and that the spill was therefore "not subject to federal regulation." *Id.* The government argued that its regulatory definition of "navigable waters" includes all "tributaries" of navigable-in-fact waters which covers all waters, excluding groundwater, that have any hydrological connection with "navigable water." *Id.* at 345. The Fifth Circuit refused to bless the government's expansive definition of tributaries:

> In our view, this definition is unsustainable under *SWANCC*. The [Clean Water Act] and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor **truly adjacent to navigable waters**. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Needham, 354 F.3d at 345-46 (citing *Rice*, 250 F.3d at 269).

The *Needham* Court noted that the government's

definition of tributaries would push the "outer limits of the *Commerce Clause* and raise serious constitutional questions" and that *SWANCC* "rejected such an expansive reading of the" Clean Water Act. *Id.* at 346 n.8. The *Needham* Court observed that: "Under *Rice*, the term "adjacent" cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a **"significant nexus" between the water in question and the navigable-in-fact waterway**." *Id.* at 347.

The *Needham* Court interpreted the Corps definition of "adjacent" to require a significant measure of proximity to navigable waters, in the following passage:

> The Army Corps of Engineers defines "adjacent" to mean "bordering, contiguous, or neighboring." *33 C.F.R. § 328.3*. However, this regulation was invalidated, at least in part, in *SWANCC*. Nevertheless, the Corps' definition comports with the term's plain meaning. Webster's Third New International Dictionary 26 (1986) offers several definitions: "(a) not distant or far off: nearby but not touching; (b) relatively near and having nothing of the same kind intervening: having a common border: abutting, touching: living nearby or sitting or standing relatively near or close together; and (c) immediately preceding or following with nothing of the same kind intervening." Hence, both the regulatory and plain meaning of **"adjacent" mandate a significant measure of proximity**. Therefore, **including all "tributaries" as "navigable waters"** would negate *Rice's* adjacency requirement, and extend the [Clean Water Act] **beyond the limits set forth in *SWANCC***. *Id.* at 347 n.12 (emphasis added).

Amici submit that the analysis from the Fifth Circuit (*Rice* and *Needham*) applies the correct reading of this *SWANCC* which replaced the "hydrological connection" test with the"significant nexus" test and a minimal hydrological connection between is not sufficient to confer jurisdiction. Otherwise runoff hundreds of miles from navigable waters will confer jurisdiction, allowing the Corps to regulate every drop of water in the United States.

D. Twenty Miles Is Not a Significant Measure of Proximity between the Wetlands on the Rapanos Property and the Navigable Waters to confer Clean Water Act Jurisdiction.

The District court in *U.S. v. Rapanos*, 190 F. Supp. 2d 1011 (ED MI 2002) correctly noted that petitioner Rapano's "property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it roughly twenty miles from where the Kawkawlin River -- the nearest body of navigable water -- becomes navigable." *Id.* at 1012. The "nearest body of navigable water to [the Rapanos'] property is roughly **twenty linear miles away**." *Id.* at 1015 (emphasis added).

To reach Clean Water Act jurisdiction over the wetlands over the Rapano's property, the Corps must claim jurisdiction over all tributaries, however trivial or intermittent. The Corps would in effect, regulate all water in every state, because everything above sea level eventually drains into a navigable waterway. This is light of the plain reading of the Clean Water Act which used the words "the waters of the United States" as opposed to "all water within the United States."

The words of Chief Justice Rehnquist's are instructive: it is "the significant nexus between the wetlands and 'navigable waters'" that must inform our reading of the [Clean Water Act].

SWANCC, 531 U.S. at 168. Because, as Justice Stevens points out, [*SWANCC*] has substantially altered the meaning of "navigable waters" in the [Clean Water Act], a "significant nexus" must constitute more than a mere "hydrological connection." *SWANCC*, 531 U.S. at 176-77 (Stevens J., dissenting). The Sixth Circuit has essentially ignored this Court's instructions and maintain the hydrological connection status quo.

The Corps regulations do not define tributary.[5] Hence, it must be given its common and ordinary meaning. The common, roadside drainage ditch bordering property cannot be reasonably construed in common parlance to be a tributary. Even if, however, the ditch can be said to be a "stream" and therefore a tributary, it is not a tributary twenty miles from a navigable river. The attenuated link between the wetlands on the Rapanos property and the navigable river precludes labeling the runoff from the wetlands as a tributary. The main ditch on the Rapanos property does not qualify as a tributary because it is not contiguous or adjacent to navigable waters. The argument that navigable waters includes all tributaries of navigable waters is unsustainable under *SWANCC*.

The Clean Water Act is not so broad as to permit the Corps to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters. It is doubtful that Congress authorized the Corps to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters,"

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[5] The Corps 1975 regulations define "Primary tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. 209.120(d)(2)(ii)(e).

to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot conceivably apply to a drainage ditch twenty miles removed from a navigable river. This would have far-reaching consequences, and impose severe limitations on a landowner's use of their land.

II. THE PROPER JURISDICTIONAL ANALYSIS UNDER THE CLEAN WATER ACT DOES NOT CONFER JURISDICTION IF THE WETLANDS LACK ANY CONNECTION TO NAVIGABLE WATERS.

A. The Clean Water Act Does Not Extend to Wetlands Adjacent to Nonnavigable Tributaries Where the Runoff Does Not Enter The Nonnavigable Tributaries.

SWANCC affirmed that it "was the **significant nexus** between the wetlands and navigable waters that informed [its] reading of the [Clean Water Act] in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167. The significant nexus was found in *Riverside Bayview Homes* because the wetland were "actually abut[ting]. . . a navigable waterway." *Riverside Bayview*, 474 U.S. at 131, 135.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) a developer sought to build a housing development on 80 acres by filling wetlands on property "**adjacent** to a body of **navigable water** . . . Black Creek, a navigable waterway."*Id.* at 131. The "property is part of a wetland that **actually abuts on a navigable waterway**." *Id.* at 135. The issue was "limited" to whether the Corps could "exercise jurisdiction over wetlands adjacent" to navigable waters. *Id.* at 131. The opinion twice expressly declined to hold that the Corps may exercise jurisdiction over "wetlands that are

not adjacent to bodies of open water." *Id.* at 131-32 n.8 and 124 n.2.[6]

The majority opinion in *SWANCC* repeatedly refers to the wetlands at issue in that case as "isolated" despite the fact that, as the dissent points out, even the most seemingly 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *SWANCC*, 531 U.S. at 176, n.2 (Stevens J., dissenting). The dissent notes that the wetlands are at least ecologically connected and "anything but isolated." *Id.* Despite this, the majority still refers to the wetlands as isolated. This lead the *SWANCC* majority to conclude that even if there is a hydrological connection, the wetlands are isolated for purposes of the Clean Water Act. *Id.* at 171-72.

B. The Drainage Ditch Along Carabell's Property Is Not Adjacent to Navigable Waters.

The Sixth Circuit noted in *Carabell v. U.S. Army Corps*, 391 F.3d 704 (6th Cir 2004) that when the ditch was excavated on the Carabell's property "the spoils were cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch. The berm edging the Carabells' property serves to **block immediate drainage of surface water out of the parcel into the ditch**." *Id.* at 705 (emphasis added). The Carabell property is adjacent to a ditch which connects to tributaries of navigable waters, however, the ditch on "Carabells' triangle-shaped property is separated from wetlands only by a

---

[6] The Supreme Court did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview Homes*, 474 U.S. at 131-32 n.8. Also, "wetlands not necessarily adjacent to other waters" 33 C.F.R. §§ 328.3(a)(2) and (3) was "not now before" the court. *Id.* at 124 n.2.

man-made berm or barrier." *Id.* at 708. The Sixth Circuit concluded that the wetlands on the "Carabells' property are separated from a tributary of 'waters of the United States' only by a man-made berm or barrier, they are considered 'adjacent wetlands' under § 328.3(a)(7). As such, the wetlands at issue in this case fall within the jurisdiction of the Corps for purposes of the CWA." *Id.* at 709.

The wetland in *Riverside Bayview Homes* served "to filter and purify water draining into adjacent bodies of water." *Id.* at 134-35. However, wetlands on Carabell's property "block immediate drainage of surface water out of the parcel into the ditch." *Carabell*, 391 F.3d at 705. There is no nexus with the navigable river. The runoff on the Carabell's property does not reach the navigable river, and the lack of nexus with the navigable river is certainly not significant.

The term adjacent cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a "significant nexus" between the water in question and the navigable-in-fact waterway. This requires the adjacent body of water be "sufficiently linked" to the navigable-in-fact water. The Corps regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). However, the connection between the drainage ditch and the Carabell property is separated by a man-made berm and is far too attenuated to become waters of the United States within the meaning of the Clean Water Act. The attenuated connection between the ditch enclosure and the waters of the United States is significant evidence that the drainage ditch is not adjacent.

The Clean Water Act provides for jurisdiction over "navigable waters," defined as "waters of the United States." Nothing in that language, other provisions of the Clean Water Act, or legislative history shows a clear indication or

unmistakable intention to reach waters that are not connected to navigable waters.

Since the ditch running along the Carabells' property is separated from wetlands only by a man-made berm or barrier. It is logical that this would limit the entrance of any pollution on the property from entering the downstream waters. This would also limit sediment transport from the property to downstream navigable waters. By berming the property a landowner should be able to remove the property from the Corps jurisdiction as this would limit any substantial nexus to the navigable waters. However, the Corps would assert that the manmade berm is jurisdictional. In effect, a landowner is not permitted to enclose the wetlands or creeks on its property. However, if the purpose of the Clean Water Act is to restore and maintain clean water, then this enclosure should be encouraged. Unless the Corps has converted the Clean Water Act into a wildlife conservation act.[7] If so, this should change should be spelled out by Congress, and not the Corps. The *SWANCC* majority noted that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC* at 172.

Any connection between the runoff from the property and navigable waters is highly attenuated at best, and the drainage ditch on the property could be deemed a tributary by wrenching the word of its plain meaning, and thereby stepping outside the Corps statutory and constitutional boundaries.

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[7] The "Clean Water Act is not a comprehensive wildlife protection statute. Although the Act mentions wildlife as an important result of controlling pollution, the purpose of the Act is to restore and maintain clean water, not to conserve wildlife." *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1322 (7th Cir. 1992), vacated, 975 F.2d 1554, adopted, 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring).

C. Federal Jurisdiction over Adjacent Wetlands must Be Scrutinized Carefully Because Land Use is an Area of Traditional Local Control.

In enacting the Clean Water Act, Congress never suggested that it intended to usurp traditional local authority over all surface drainage courses, or that it intended to upset the federal-state balance by regulating all waters and wetlands, however trivial and far removed from any navigable waterbody. Congress did not intend to sweep within federal jurisdiction, all surface runoff, however minuscule or intermittent, within the country. This effects a massive intrusion of federal power into land use decisions that by tradition are the province of the States. Nonetheless, the Corps is now attempting to direct local development activities, e.g., the enclosure of ditches, and the grading of soil for homebuilding.

When Congress enacted the Clean Water Act, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

However, the Corps regulation prohibit a property owner by enclosing its property from navigable waters. This clearly prevents the discharge of pollutants to be controlled at the source by preventing their entry into navigable waters. Unfortunately, if a property owner seeks to encircle his land with berms so that the waters no longer leave his property, the man-made berms do not prevent the Corps jurisdiction.

This confirms the severe federal intrusion into areas of traditional state and local control by the Corps. Congress clearly tried to strike a careful balance, asserting federal authority where

necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere. The Corps usurpation of local land use, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the Clean Water Act, but Congress made explicit in the Act its intention to preserve state and local land use regulation.

While Congress intended the Clean Water Act to encompass "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *Riverside Bayview*, 474 U.S. at 133, there is no reason to believe that in using the familiar terms "navigable waters" and "waters of the United States," Congress suddenly meant to regulate all drainage flows. There simply is no statutory support for the claim that federal jurisdiction extends over all drainways in the nation, or that a parcel of land can be regulated by the Corps as long as rain falling in the area "eventually" drains downstream via a roadside drainage ditch. Indeed, it is beyond belief that Congress ever could have envisioned the Clean Water Act being applied to assert federal jurisdiction to regulate common, every-day roadside drainage ditches simply because of an ultimate connection to a far-off navigable waterway. Such an intrusion, and on such a monumental scale, into a matter of such long-standing state and local concern would, if intended, surely have been mentioned in the legislative process. It was not.

Given its "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States." *United States v. Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). By prohibiting the development of land which seeks to close itself from navigable waters, the Corps is able to bar projects that have been approved by state and local authorities based on the Corps view that they do not comport with the "public interest." 33 C.F.R. § 320.4(a).

See *Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.")

The Corps limitless jurisdiction intrudes upon traditional local authority to control the use, development, and preservation of land and water resources that Congress expressly recognized in the Clean Water Act. The Corps utterly limitless assertion of federal jurisdiction obliterates any "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 564, 568. The Corps aggrandizement of its own authority to regulate man-made berms which prevent water from flowing to navigable rivers is clearly not found in the Clean Water Act.

III. CONCLUSION.

The Corps regulatory authority under § 404 of the Clean Water Act has limits, and those limits forbid its regulatory authority over the enclosure of small intrastate ditches, miles from navigable waters. The Corps has not shown any discernible effect on interstate commerce, much less a substantial one, caused by enclosing small intrastate ditches. The Corps does not have § 404 authority to regulate the enclosure of property where the runoff does not reach navigable waters, or where the runoff travels many miles from navigable waters. The judgment of the Sixth Circuit should be reversed in both cases before this Court and judgment should be entered on behalf of the petitioners.

Respectfully submitted,

SEBASTIAN RUCCI
3058 Chardonnay Lane
Poland, OH 44514
(330) 707-1182
Counsel for Amicus Curiae Attainable Housing Alliance

DEC 13 2005 (22) (28)

No. 04-1034 *consolidated with* No. 04-1384

In the
Supreme Court of the United States

JOHN A. RAPANOS *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS
et al.,
Respondents.

On Writs of Certiorari to the United States
court of Appeals for the Sixth Circuit

MOTION OF AMICUS CURIAE JEROME B. CARR, Ph.D. TO FILE A LATE BRIEF IN SUPPORT OF THE PETITIONERS

Brian M. Hurley
Rackemann, Sawyer & Brewster
One Financial Center
Boston MA 02111

MOTION

Pursuant to Supreme Court Rule 37, I have tried to secure written consent for the late filing of the attached *Amicus Curiae* from counsel for the Petitioners and Respondents. Although counsel for the Petitioners granted such consent, counsel for the Respondents withheld it, even though *Amicus* had been told that the Respondents had been granted a time extension for one of their Briefs. Accordingly, I, Jerome B. Carr, Ph.D. telmatologist (wetland scientist) and Certified Professional Hydrologist, author of theBrief *Amicus Curiae* moves this court for permission to late file the Brief *Amicus Curiae* which is submitted herewith. *Amicus* makes this motion on the following grounds.

Amicus curiae, Jerome B. Carr, Ph.D. has 40 years experience in water sciences including hydrology, limnology (study of lakes), meteorology, oceanography, telmatology (study of wetlands), and water quality. For the past 30 years, I have worked mainly in the fields of hydrology and wetland sciences. In 1983, when the Commonwealth of Massachusetts passed more restrictive wetland regulations, the head of the Wetlands Division of the Mass. Dept. of Environmental Protection stated at a meeting presenting the more restrictive regulations, that Mass. was going to protect until we understand how to manage our wetland resources. On the next day I began a program of very thorough research on wetlands, their evolution, and function. I am now the only scientist in Mass. who is a member of the International Peat Society. I found in their Proceedings of the International Peat Congresses, the world class research that I needed for the understanding of wetlands and their function. On those ideas, I conducted my own field research whenever it would serve both my desire for knowledge and my clients' needs. I am a member of nine other professional scientific organizations, and subscribe to over 20 scientific journals. In addition I have built a very large wetland library at the Carr Research Laboratory, Inc. which wasfounded in 1974. When

graduate students select a wetland topic for their M.S. Thesis, and cannot get the references they want from inter-library loan, they have been referred to me and my library for hard to find books and papers. Often, I have almost everything they are looking for, and I supply them with books and papers that they had never found in their review of the technical literature.

The only reason I have for asking for permission to have the court accept this Brief *Amicus Curiae* is because I want to raise and answer **one very fundamental question** that has not been presented to this Court; knowing that this question will make the Court's work far simpler and its decision based on defensible world class hydrology and wetland science. That question is:

> **"How can wetlands physically or jurisdictionally contribute to intra- and/or inter-state or foreign commerce via navigable waters, when most vegetated wetlands have been proven to be net sinks (consumers) of water and thus a detriment to the amount and function of navigable waters?"**

The science based answer to that question is simple, straightforward and direct; and will make the Court's decision far easier by eliminating debate over minutiae.

The only reason I have for asking for acceptance of this late Brief *Amicus Curiae* is because the Clerk's staff at the Supreme Court never returned any of my timely phone calls or voice mails in early November asking for the due date for my Brief *Amicus*. In addition, after making four phone calls in early November requesting this information, I then sent a letter addressed to the Chief Clerk of the court on 23 November requesting the due date. Had I been given the courtesy of a timely phone call, voice mail, or email, I could have met the 2 December 2005 deadline. I only found the deadline date by going on-line and finding the names of the lawyers for the Petitioners. One of them accepted my phone call and that individual was kind enough to tell me thedeadline due date had been one working day prior to my on-line search. Note, that had I been notified on the Monday or Tuesday after Thanksgiving, 28 or 29 November 2005, I could have made the due date of 2 December 2005,

because I would have cancelled all my field work, and expanded my working hours into the late night to finish the Brief *Amicus*.

Note, this work is all *pro bono publico* and neither I nor my firm is being paid for my time and effort. Nobody is prejudiced by this motion or attached Brief.

Wherefore, Jerome B. Carr, Ph.D. respectfully requests that this Court grant *Amicus Curiae* leave to late file the attached Brief in support of linking high quality science to high quality law review by this Court.

Respectfully submitted,

Jerome B. Carr, Ph.D.
Telmatologist (Wetland Scientist) &
Certified Professional Hydrologist
Carr Research Laboratory, Inc.
17 Waban Street
Wellesley, Mass. 02482
phone 508-651-7027
FAX 508-647-4737
e-mail carr@carr-research-lab.com

Technical Offices
Suite D-36
251 West Central ST
Natick MA 01760

Dated: 15 December 2005

Petitioners Consent Letters follow this page.

Carr Research Laboratory, Inc.
Environmental Science, Engineering, & Resource Management

Administrative Office:
17 Waban Street
Wellesley, MA 02482-6310

Technical Office:
251 West Central Street, Suite D-36
Natick, MA 01760-3758

(508) 651-7027
(781) 237-2488 (evenings)
(508) 647-4737 (Fax)

carr@carr-research-lab.com
www.carr-research-lab.com

6 December 2005

Mr. M. Reed Hopper, Esq.
Pacific Legal Foundation
Suite 200
3900 Lennane DR
Sacramento CA 95834

Dear Mr. Hopper:

As a Certified Professional Hydrologist and a telmatologist (wetland scientist), I am writing to request consent for a late filing of an *amicus* brief from all three parties for Docket Number 04-1034 (John A. Rapanos *et ux et al*), and Docket Number 04-1384 (June Carabell *et al*), and I understand that these two cases have been joined together. My brief will be in support of the petitioners.

The reason why I am making this request for a late *amicus* brief is because I could not get an answer to the question from the Supreme Court Staff on what the due date was for *amicus* briefs. In early and mid-November I phoned the Clerk's Office four times and either spoke to someone or left a voice mail message, and no one ever returned my call. On 23 November 2005, I sent a letter to the Chief Clerk's office at the Supreme Court asking the same question, and I never got a reply. They apparently lacked time to even send me a four or five word e-mail, or a fax, or a 30 second voice mail with a due date. Had I been given the due date of 2 December, it would have been met.

As a professional working with wetlands and hydrology for over 30 years, and as someone who has been doing research on wetland function and evolution for over 20 years, and as the only wetland scientist in Massachusetts who is a member of the International Peat Society, I believe that a few pages of fundamental wetland science will be of great help to the Supreme Court. I recently heard what must be an old saying that "Science and politics don't mix." However, I very firmly believe that science and law should mix since both are based on precision and logic to better serve our citizens in the long run.

Thus I hope that you will be so kind as to write me a Consent Letter granting me permission to submit a late *amicus* brief. I can have it in your hands no later than Tuesday 13 December via express mail, *if* I am granted consent by all three parties by noon on Friday, given that I will need the weekend to produce a document to meet your filing requirements and format. Thank you for your kind and prompt attention to this matter. Please reply by FAX or e-mail if your consent will be granted.

Most cordially,

Jerome B. Carr

Jerome B. Carr, Ph.D.
Telmatologist (Wetland Scientist) &
Certified Professional Hydrologist

Via Fax and Certified Express Mail

As the representative for the Petitioners, John A. Rapanos et al, I hereby consent to this request for a late *amicus* brief.

M. Reed Hopper, Esq. — (Date)

supreme court 3let 05

Carr Research Laboratory, Inc.
Environmental Science, Engineering, & Resource Management

Administrative Office:
17 Waban Street
Wellesley, MA 02482-8310

Technical Office:
251 West Central Street, Suite D-36
Natick, MA 01760-3758

(508) 651-7027
(781) 237-2486 (evenings)
(508) 647-4737 (Fax)

carr@carr-research-lab.com
www.carr-research-lab.com

6 December 2005

Mr. Timothy A. Stoepker, Esq.
Dickinson Wright PLLC
Suite 400
500 Woodward AVE
Detroit MI 48226-3425

Dear Mr. Stoepker:

As a Certified Professional Hydrologist and a telmatologist (wetland scientist), I am writing to request consent for a late filing of an *amicus* brief from all three parties for Docket Number 04-1034 (John A. Rapanos *et ux et al*), and Docket Number 04-1384 (June Carabell *et al*), and I understand that these two cases have been joined together. My brief will be in support of the petitioners.

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Most cordially,

Jerome B. Carr

Jerome B. Carr, Ph.D.
Telmatologist (Wetland Scientist) &
Certified Professional Hydrologist

Via Fax and Certified Express Mail

supreme court 3let 05

As the representative for the Petitioners, June Carabell et. al. I hereby consent to this request for a late *amicus* brief.

Timothy A. Stoepker, Esq.

12-7-05
(Date)

In the
Supreme Court of the United States
October Term, 2004

No. 04-1034 *consolidated with* No. 04-1384

JOHN A. RAPANOS *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS
et al.,
Respondents.

On Writs of *Certiorari* to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JEROME B. CARR, Ph.D. TELMATOLOGIST (WETLAND SCIENTIST) & CERTIFIED PROFESSIONAL HYDROLOGIST IN SUPPORT OF THE PETITIONERS ON THE MERITS

QUESTIONS PRESENTED FOR REVIEW

1- "How can wetlands physically or jurisdictionally contribute to intra- and/or inter-stateor foreign commerce via navigable waters, when most vegetated wetlands have been proven to be net sinks (consumers) of water and thus a detriment to the amount and function of navigable waters?"

2- Since someone may suggest that water quality or some other behavior of wetlands may impact navigation; very briefly, how do wetlands affect water quality and other presumed wetland values?"

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INTERESTS OF THE *AMICUS CURIAE*

Amicus Jerome B. Carr, Ph.D. seeks to bring to the Court's attention his views and the views logically derived from scientific interpretation of data published in the scientific literature concerning the authority of the Army Corps of Engineers to regulate filling of inland vegetated wetlands under 33 U.S.C. § 1251 *et seq.* ("CWA"). [1]

Amicus curiae Jerome B. Carr, Ph.D. has spent about 85% of his 40 year career to date working on sciences associated with water, including but not limited to description of and/or quantification of waters behavior, its cycling between the atmosphere, its quality, and the life therein. I was a Certified Wetland Scientist in the State of New Hampshire, which was thefirst state of the union which certified individuals in the science, and have been a Certified Professional Hydrologist by the American Institute of Hydrology since 1984. Knowing that both science and the interpretation of the law requires detailed knowledge and precise application of that knowledge to benefit all our citizens and residents, I am seeking to assist the Court by review of the water budgets of open water bodies such as navigable lakes, and the real world impacts of the vegetative wetlands which border our lakes, salt water bodies, and all their tributaries.

---

1 Pursuant to Supreme Court Rule 37.6 *Amicus* states that he alone authored this Brief, without benefit of counsel, and that no one other than the *Amicus* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3(a) *Amicus* submitted a consent letter to both parties to the filing of this Brief, and counsel for both Petitioners returned signed consent. The Respondents' counsel did not consent.

JURISDICTION

The definition of "waters of the United States" is found in 33 Code of Federal Regulations (CFR) Part 328.3. Wetlands are included as sub-part (7). That inclusion of wetlands as waters of the United States relative to navigable waters should logically apply only to wetlands that are sources of water, and not to net consumers (sinks) of water.

SUMMARY OF THE ARGUMENT

It is well known at the highest levels of hydrologic and wetland sciences, that with very few exceptions, vegetated wetlands are net consumers of water and as such are detrimental to navigable waters. This was initially demonstrated during research on cattail marshes which typically abut open waters or deep marshes (water 6 feet deep or less) in 1911 as reported in "*A Treatise on Limnology*." [2] This has been confirmed by numerous other more recent studies conducted *in situ*.

The published values of average annual evapotranspiration water loses to the atmosphere for the most common vegetated wetlands range from about 1.7 times average annual local lake evaporation to in excess of 3.0 times lake evaporation. When the calculations are done, the water loses from vegetated wetlands exceed, and often far exceed, average annual precipitation. Thus vegetated wetlands are net sinks for waters which degrade the function navigable waterways, and do not help preserve them or their commerce related functions. It turns out that excavation of vegetated wetlands creates more potential navigable water surfaces and thus adds to downstream flows. Also, filling of vegetated wetlands to the extent that

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2 Hutchinson, G. Evelyn; *A Treatise on Limnology*, Volume III, page 196,. John Wily & Sons, New York, 1975.

they become functional uplands also adds to downstream flows. Thus either alteration results in benefits to navigable waters and thus wetlands (a) should not be regulated as waters of the United States, or (b) should not be inhibited by the regulators in a fashion that excludes proposed land use changes, other than by ensuring no downgradient harm to functional open waters by erosion or added flooding.

ARGUMENT

Scientific evaluation of wetland hydrology is typically done by making *in-situ* measurements of (a) interception of rainfall which results in direct evaporation from plant surfaces, (b) direct evaporation from soil surfaces under the plant community, and (c) transpiration (passage of gas or liquid as a vapor through the skin, a membrane or other tissue). The sum of these are called evapotranspiration. In the case of plants, leaves have small pores that allow passageof gas and this is the route to the atmosphere for water taken in by plant roots.

The best way to understand why wetland vegetation pumps more water to the atmosphere than does upland vegetation is to understand how plant roots and soil hydrology interact. In uplands, after a rainstorm, a zone of moisture passes vertically through the soil as groundwater recharge. For the duration of time that this water is in contact with root surfaces, water is taken up by plants and much of that water is released through the leaf pores. In New England, rainfall events are spaced on average about every six days. Thus as the soil drains between rainfall events, there is less and less water available for upland plant uptake. In a wetland environment, groundwater that is recharged in upgradient uplands is discharged into the wetlands. Most wetlands have saturated soils within 12 inches of the surface for allof the year. Thus water is available for uptake by plant roots all year, and there is no constraint to water access for plant transpiration in wetlands, with a possible except during significant droughts.

For forested wetlands, evapotranspiration was measured at 1.8 times open water evaporation in a New Hampshire wetland.[3] An evapotranspiration/ lake evaporation ratiosummary for typical wetland herbs was published by Boyd[4] but note that his own measured ratios require a correction from pan evaporation to lake evaporation, so his own water loss ratios require a significant revision upwards. Without returning to the original references he quotes in the lower part of Boyd's table 2, similar upwards adjustments may be required to ratios if pan evaporation was used rather than lake evaporation. The cattail environments referenced in Boyd's table 2, had evapotranspiration rates that ranged from 1.75 to 2.5 times local lake evaporation, with an average ratio of 2.0. Thus while rates are variable depending on physical settings, emergent wetlands from cattails to wooded swamps are consistently reported as losing more water to the atmosphere than open water lake evaporation. Note also in this study, the statements that only plants that cover water surfaces such as duckweed and water lilies consistently reduce the water lost compared to open water surfaces.

To relate these ratios to the state of Michigan where the court sites are based, I used the precipitation and lake evaporation from the Central Michigan area around Lansing, Michigan.[5] The results are presented on the next page.

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3 Hall, F.R. *et al.*, *The Influence of a New England Wetland on Water Quantity and Quality*; Research Report #4, Water Resource Research Center, University of NH, Durham NH. 1972.

4 Boyd, C.E.; *Evapotranspiration/ Evaporation Ratios for Aquatic Plants*; Journal of Aquatic Plant Management, Vol. 25, pp. 1-3. January 1987.

5 *Climatic Atlas of the United States*, U.S. Dept. of Commerce, National Climatic Center, Ashville, NC, reprinted 1979.

- Average annual precipitation = **31.5** inches per year
- Average annual lake evaporation = **30.25** inches per year
- Cattail marshes range from = 30.25 x 1.75 = **52.94** in/yr
  to 30.25 x 3.0 = **90.75** in/yr. inches per year.
- Wooded swamp water loss = 30.25 x 1.8 = **54.45** in/yr.

Thus all of these wetland types are net sinks for water and cannot contribute to the value of navigable waters because they lose more water to the atmosphere than they receive as precipitation. Given their negative impact on navigable waters, they should not be jurisdictional or categorized as regulated "Waters of the United States" for any transportation or commerce activities.

In terms of altering emergent vegetated wetlands which abut open water bodies that serve as navigable waters in some context, it is to be stressed that both filling or excavation can enhance water release to downgradient surface waters. Excavation into a permanent pond begins to add water to the downgradient navigable waters, while filling wetlands to create upland status actually increases the available water for all downgradient surface waters even more than excavation does. Note that mean annual runoff for central Michigan is about 10 inches per year, and thus conversion of an wooded wetland to an upland would add about to 33 inches of new available water for all downgradient navigable waters due to 10 inches of new upland runoff plus another 23 inches of elimination of excess evapotranspiration.

As mentioned earlier, plants that cover the surface of standing water reduce lake evaporation. However, those areas are classed as shallow marsh wetlands in standing water, and do not function as emergent wetlands which are growing on unflooded saturated soils for most of the year. Note that some ponded water wetlands, dominated by mostly submerged aquatic weeds are also valuable as navigable waters and water supply for downstream areas depending on dominant plant types. Other open water

areas dominated by different aquatic plant types can be uses as navigable waters in spite of functioning as net sinks for water.[4] The only other wetland type that does not offer water losses at rates less than open water evaporation are sphagnum moss type bogs with peat deposits. In these bogs, water losses are at a ratio of about 0.9 times local lake evaporation.

SECONDARY WETLAND FUNCTIONS

As a final matter, there may be some people who might wish to suggest to the Court the idea that other values of emergent vegetated wetlands somehow should apply to the commerce clause or navigable waters. These likely concepts are very briefly reviewed below.

Water Quality. Based on my 30 years of sampling water quality in New England, I have yet to find a wetland that improved water quality. I measured the pH (acidity) of water coming out of one wetland, and the water was so acid it could kill fish. Once peat formation starts in forested wetlands, the water coming out of the wetland is so brown it is called New England tea. Note that this brown water contains tannic acid which is a proven carcinogen. In terms of actual function, clean naturally filtered groundwater is what enters the wetlands from the upgradient side, with colors typically of around 10 color units. However, even small wetlands releasing this water after it passes through the wetland soil can produce colors in excess of 100 color units. One moderate size wetland I tested had a water color that was beyond the instrument's scale of 500 color units.

As for heavy metal uptake by the plants in vegetated wetlands, it can be of nominal value in case of a large release. However, thereafter the plants keep recycling the heavy metals, and to the extent that the plants are eaten by wildlife, the metals are returned to the ecosystem. Due to this constant uptake by live plants and release at the soil surface by dying plants, this explains why heavy metal

concentrations are maintained near the surface of wetland soils and not buried at depth as some people postulate.

Wetlands Protecting Water Bodies from Upland Sedimentation. Most people know that open water bodies fill by accumulation of leaves from trees, and deposits from water lilies, aquatic plants, and cattails. As an example, when my grandfather was a teenager, he planted water lilies for his mother in Carr's Cove on Cayuga Lake in New York. He dove into the water that was almost six feet deep to plant the water lilys. About 50 years later when I was about 12 years old, I found that it was very difficult to row across the water lily portion of Carr's Cove because of the muck generated by the water lilies was touching the bottom of the small rowboat. In addition, cattails and the giant reed *Phragmites* soon invaded the edge of the lake on the water-lily muck, and the major portions of the cove edges lost any ability to be used a navigable water. Thus direct deposition of mineral soils is frequently less than organic muck formation in most water bodies surrounded by wetlands.

Flood Control. Vegetated wetlands soon start accumulating organic matter known as peat. The average rate of peat accumulation formed outside of standing water is 4 inches per 100 years. Thus, even in a drainage basin with zero land use changes to increase flooding, the peat accumulation process raises floodplains in areas dominated by vegetated wetland by about 4 inches per 100 years.

Note also, that once peat formation starts, the organic soils soon develop extremely low permeabilities. Thus once the soils are impacted by rain, they tend to stay full of water, and the void spaces in the soils are not available forstorage of flood waters. Figure 1 on page 8 shows water flow monitoring conducted in two adjacent wetlands.[6]

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6 Heikurinen, L.; Comparison Between Runoff Conditions on a Virgin Peatland and a Forest Drainage Area" Proceedings of the 5th International Peat Congress, Vol. 1, pp 76-86, Wydawnictwa Czasopism Technicznych Not, Warsaw, Poland 1976.

Figure 1 shows that the virgin wetland (with flows represented by circles) which had not been altered by man in its recent history, released no water during dry periods, and released a large peak flow which created significant downstream flooding following a large rain storm. In contrast, the adjacent wetland, managed by wide-spaced ditching that kept the wetland intact as a wetland forest (with flows represented by squares), allowed drainage between rain fall events. The managed wetland had continuous outflow even during dry periods, and the flood peak from the same storm was 40% lower than the peak flood flows from the virgin wetland. This proves that mature unmanaged wetlands are not valuable for (1) for water supply for downstream navigable waters, or (2) flood control.

The message for all parties is that the Unites States does not benefit from protection of emergent vegetated wetlands, but can significantly benefit from science based wetland stewardship.

CONCLUSION

Open waters are in and of themselves useful as navigable waters for commerce. Shallow water wetlands such as areas dominated by water lilies or duckweed are also useful as water supplies for downgradient open waters. Some areas dominated by other partially submerged aquatic plants are functional navigable waters, but those areas may have a negative downstream impact by becoming a sink for water to downstream areas. These ponded water bodies remain useful as navigable waters except if isolated from all other surface waters.

In terms of emergent vegetated wetlands, starting with cattail marshes which evolve into shrub and forest swamps; the entire series of natural transitions are of no value to abutting surface water bodies because they lose more water than what arrives as precipitation. As such,

they are net sinks for water and clearly have a negative impact on abutting or distant downgradient surface waters in terms of navigation. Thus those emergent wetlands should not be classed as waters of the Untied States and they should not require a permit under any existing federal legislation, including the Clean Waters Act.

Respectfully submitted,

Jerome B. Carr, Ph.D.
Telmatologist (Wetland Scientist) &
Certified Professional Hydrologist
Carr Research Laboratory, Inc.
17 Waban Street
Wellesley, Mass. 02482
phone 508-651-7027
FAX 508-647-4737
e-mail carr@carr-research-lab.com

Technical Offices
Suite D-36
251 West Central ST
Natick MA 01760

Dated: 15 December 2005

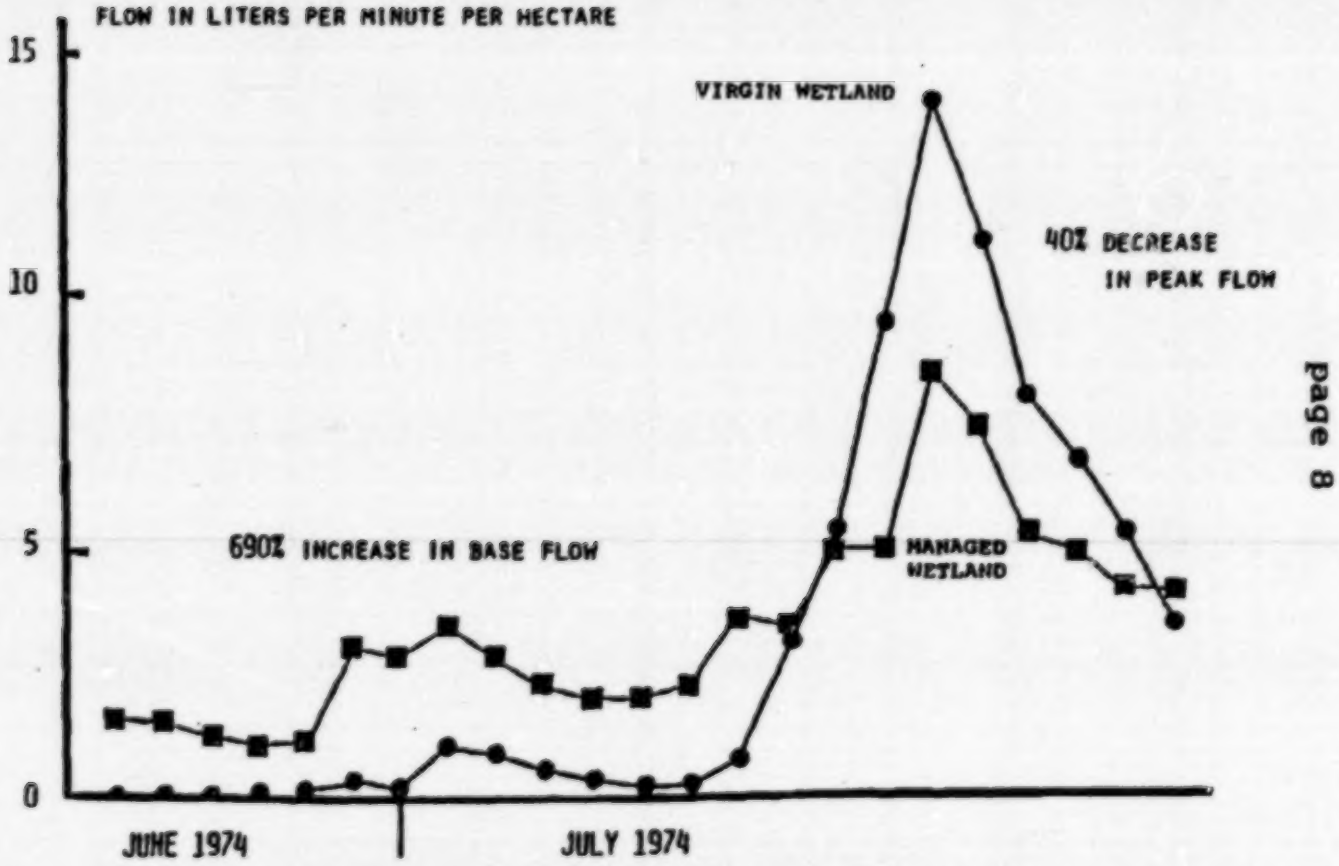

Figure 1. Comparison of Adjacent Managed Wetland with an Adjacent Virgin Wetland.

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Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR AMICI CURIAE THE CHESAPEAKE BAY FOUNDATION IN SUPPORT OF RESPONDENTS WITH APPENDIX

Jan Goldman-Carter
ATTORNEY AT LAW
4504 Casco Avenue
Edina, Minnesota 55424
(952) 922-2003

Counsel of Record for Amicus Curiae Chesapeake Bay Foundation

Jon A. Mueller
DIRECTOR OF LITIGATION
THE CHESAPEAKE BAY FOUNDATION, INC.
6 Herndon Avenue
Annapolis, Maryland 21403
(443) 482-2162

Counsel of Record for Amicus Curiae Chesapeake Bay Foundation

THE LEX GROUP^{DC} • 1750 K Street, NW • Suite 475 • Washington, DC 20006

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INTEREST OF AMICUS CURIAE[1]

The Chesapeake Bay Foundation (CBF) is the only independent 501(c)(3) organization dedicated solely to restoring and protecting the Bay and its tributary rivers. Since 1967, our goal has been to improve water quality by reducing pollution. Our motto is *Save the Bay*.

Pollution is choking the Bay and many of its tributary rivers. In the summer of 2005, 41 percent of the volume of the Bay was considered a "dead zone," an area with insufficient oxygen to support marine life. The Chesapeake Bay Program, an arm of the U.S. Environmental Protection Agency (EPA), recently declared that the size of this area is the largest on record. This anoxic zone is caused in large part by excessive nitrogen and phosphorous discharges to the Bay and its tributaries. CBF strives to reduce this pollution from, among other sources, sewage treatment facilities, other industrial sources, agricultural runoff, and urban and suburban stormwater.

CBF's efforts are supported by its 140,000 members, volunteers, concerned citizens, advocates and staff. CBF's staff of 170 includes scientists, policy experts, attorneys, educators, and grassroots organizers pursues our goal through environmental advocacy, litigation, environmental education, strategic communications, and habitat restoration throughout the Bay watershed. We inform and engage the public, the private sector, and government officials to request that the necessary legislative and regulatory decisions and adequate public and private investments be made to save the Bay.

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named amicus curiae and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The purpose of this brief is to impress upon the Court that a decision to strip Clean Water Act ("CWA") safeguards from non-navigable tributaries and their adjacent wetlands will cause great harm to the Chesapeake Bay, its watershed, its aquatic ecosystem, and its people. The Chesapeake Bay is North America's largest and most biologically diverse estuary. "For more than 300 years, the Bay and its tributaries have sustained the region's economy and defined its traditions and culture."[2]

The Chesapeake Bay receives fully half of its water from an intricate network of 110,000 streams and 1.7 million wetlands most of which are non-navigable tributaries and non-tidal wetlands that drain or "tend to drain" to those tributaries, very much like the wetlands and tributaries at issue in these cases. This brief will demonstrate that the headwater streams and wetlands, and other non-navigable tributaries and associated wetlands, of the 64,000 square mile Chesapeake Bay watershed are indeed "inseparably bound up" with the Susquehanna, the Potomac, the James, and the other large navigable rivers that flow to the Bay. This intricate hydrological network cleanses the surface water, recharges the groundwater, moderates the flood flows, and provides the aquatic habitat on which the ecological and economic life of the Chesapeake Bay and its watershed depends. The health of the Chesapeake Bay truly does begin at its source.

The states of Maryland, Pennsylvania, and Virginia, the District of Columbia and the United States recognized in the 1970s that they could not solve the dire problems facing the Chesapeake Bay alone or in

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[2] Chesapeake 2000 Agreement, Preamble, at Appendix A. The signatories to the Chesapeake 2000 Agreement are Maryland, Virginia, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission (representing the Maryland, Pennsylvania, and Virginia state legislatures), and the EPA, representing the United States.

piecemeal fashion. They entered into an historic compact, the Chesapeake Agreement of 1983,[3] and an expanded agreement in 1987.[4] In 2000, Congress and the state and federal Chesapeake Bay partners strengthened their commitment to restoring the Bay ecosystem with congressional action and execution of the Chesapeake 2000 Agreement.

The Chesapeake Bay partnership exemplifies the concept of cooperative federalism – a cornerstone of the CWA. The Bay partners, through the Chesapeake Bay Agreements, have set ambitious requirements to improve the water quality and restore the living resources of the Chesapeake Bay and its watershed. They recognize, however, that without CWA jurisdiction over non-navigable tributaries and adjacent wetlands, the Bay partners cannot achieve the stricter water quality standards and waste load allocations necessary to "save the Bay."

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), the Court recognized that Congress intended to regulate wetlands "inseparably bound up with the waters of the United States," and upheld the Army Corps of Engineers' exercise of CWA jurisdiction over adjacent wetlands on that basis. The Court approved this *Riverside Bayview* adjacency holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), while narrowly holding that CWA jurisdiction did not extend to certain truly isolated intrastate ponds. The *Riverside Bayview* holding applies with equal force in this case, where the wetlands at issue drain or "tend to drain" to non-navigable tributaries that are hydrologically and ecologically bound up with downstream navigable waters. As in *Riverside Bayview*,

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[3] 1983 Chesapeake Bay Agreement, Appendix B.

[4] Chesapeake Bay Agreement of 1987, Appendix C; http://www.chesapeakebay.net/pubs/1987ChesapeakeBayAgreement.pdf (last visited January 12, 2006).

the Corps of Engineers properly asserted jurisdiction over the wetlands at issue in these cases.

The Chesapeake Bay ecosystem and the Chesapeake Bay Agreement demonstrate that the extensive networks of non-navigable tributaries and the wetlands that drain to them located upstream in watersheds are inseparably bound up with downstream navigable waters, and that the CWA goal of maintaining and restoring the physical, chemical, and biological integrity of the Nation's waters cannot be met unless these waters remain subject to the Act. For these reasons, Amicus Curiae the Chesapeake Bay Foundation respectfully requests that the Court affirm each of the decisions of the Sixth Circuit.

ARGUMENT

I. THE ECOLOGICAL AND ECONOMIC HEALTH OF THE CHESAPEAKE BAY IS "INSEPARABLY BOUND UP" WITH THE WATERSHED'S NON-NAVIGABLE TRIBUTARIES AND ADJACENT WETLANDS.

A. The Chesapeake Bay is the largest and most biologically diverse estuary in North America.

The Chesapeake Bay, a national treasure, is the largest and most biologically diverse estuary in North America.[5] It is home to more than 3,600 species of unique animals, fish, and plants including bald eagles, blue crabs, menhaden, striped bass (rockfish), osprey, oysters, and the American lotus. For more than three centuries, "the Bay and its tributaries have sustained the region's economy and defined its traditions and culture."[6]

The Bay proper is approximately 200 miles long, stretching from Havre de Grace, Maryland to Norfolk,

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[5] Chesapeake 2000 Agreement, Preamble, at Appendix A.

[6] *Id.*

Virginia. Including its tidal tributaries, the Bay has approximately 11,684 miles of shoreline. The Chesapeake Bay watershed encompasses 64,000 square miles and some or all of six states and the District of Columbia. Fifty major tributaries traverse the Appalachian, Piedmont and Atlantic Coastal Plain before flowing into the Chesapeake Bay.[7]

B. The Chesapeake Bay Watershed Is Comprised Largely of Non-navigable Streams and Adjacent Wetlands.

1. Most of the Bay watershed's stream miles are non-navigable and many flow intermittently.

One hundred and eleven thousand (111,000) miles creeks, streams, and rivers throughout the Bay watershed converge into fifty major tributaries that send water to the Chesapeake Bay.[8] The Bay's nine largest tributaries contribute 93% of the total fresh water to Chesapeake Bay,[9] about half of the Bay's total water volume.[10] The Susquehanna River is the Bay's largest tributary and contributes more than one half of the freshwater that enters the Bay.[11] The Susquehanna and its tributaries originate as small headwater streams and wetlands in New York, drain Central Pennsylvania, and

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[7] U.S. Environmental Protection Agency (EPA), *Chesapeake Bay: Introduction to an Ecosystem*, EPA 903-R-04-003 (July 2004) (*Introduction to an Ecosystem*) at http://www.chesapeakebay.net/pubs/ecosystem.pdf (last visited 1/9/06); *see*, Chesapeake Bay Watershed Map at Appendix D.

[8] Chesapeake Bay Watershed Partners Agreement (2001) at http://www.chesapeakebay.net/pubs/waterqualitycriteria/DOC_wq_finalmou.pdf (last visited January 7, 2006), Appendix D; *see also*, *Introduction to an Ecosystem* at 1, 5.

[9] U.S. Geological Survey, *Chesapeake Bay: Measuring Pollution Reduction*, Fact Sheet FS-055-95, at http://water.usgs.gov/wid/html/chesbay.html (last visited January 6, 2006).

[10] *Introduction to an Ecosystem* at 5.

[11] *Id.*

empty into the Bay in Maryland. The Potomac and James Rivers are the next two largest tributary systems flowing to the Chesapeake Bay.[12]

Each of these major Bay tributaries begins at their headwaters, far upstream of the navigable-in-fact rivers they will become. Headwaters are "the dendritic system of wetlands, swales and small streams that make up the beginnings of most watersheds."[13] Headwater streams[14] comprise the majority of streams and waters in a watershed, and they play the most important role within the watershed in improving water quality by filtering runoff, sediment, nutrients, and contaminants before they move further downstream.[15]

EPA estimates that first-order headwater streams, alone, comprise over 50% of the over 200,000 miles of

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[12] *Id.*; *See,* Chesapeake Bay Watershed Map, Appendix D. *See also,* Chesapeake Bay Program Powerpoint Presentation at www.chesapeakebay.net/pubs/waterqualitycriteria/DOC-nspresentation.ppt at slides 54, 55.

[13] Consolidated EPA Region III Response to the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" (2003) (EPA Region III ANPRM Response) at 3.

[14] Headwater streams are typically defined as first and second order streams. Higher order streams are formed by the confluence of lower order tributary streams. *See,* Meyer, J. L. et al. *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands,* American Rivers and Sierra Club, publishers (September 2003) (*Where Rivers Are Born*) at 10-11. http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182 (last visited January 8, 2006); *see* Appendix E for stream photo.

[15] EPA Region III ANPRM Response at Appendix E, Literature Review: Extent and Function of Headwater Streams, EPA, Wheeling West Virginia (February 2003) at 3-9; *see also,* EPA letter to Jeanne Christie, dated January 9, 2005 (sent January 9, 2006) (EPA letter) *in* Amicus Curiae Brief of Association of State Wetland Managers, et al (ASWM Br.), Appendix; *see also,* M.M. Brinson, *Changes in the Functioning of Wetlands Along Environmental Gradients,* 13 (2) Wetlands 65 (June 1993); Bruce J. Peterson *et al., Control of Nitrogen Export from Watersheds by Headwater Streams.* 292 Science 86-90 (April 6, 2001).

streams in EPA Region III, which encompasses most of the Chesapeake Bay watershed.[16] The Bay watershed's extensive headwater streams are important tributaries to downstream navigable waters, but they do not always flow year round; nor do they always flow above ground. Many EPA Region III first-order streams have intermittent flow periods during the summer months or during dry years.[17]

Headwater streams in the limestone or karst regions of the Bay watershed flow underground for some length before they re-emerge as a surface stream some distance downstream. These types of streams have a definite hydrological connection to downstream navigable-in-fact rivers, though the connection is not apparent by observing surface water flows exclusively.[18] However, under Petitioners' view, these tributaries would not be subject to CWA jurisdiction and would be subject to development and contamination.

Many Bay watershed headwater streams, as well as higher order non-navigable tributaries, have been channelized over time and incorporated into ditch and stormwater systems that connect non-navigable streams and adjacent wetlands to downstream waters.[19] In two recent cases, the Fourth Circuit recognized that

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[16] EPA Region III ANPRM Response, at 10, Appendix E at 3; *see also*, Rhodes, C.A., EPA Region III, *Findings in the Mid-Atlantic Region Concerning Implications for Clean Water Act Jurisdiction for Various Interpretations of SWANCC*, Presented to the ASWM Legal Workshop, Albuquerque New Mexico, October 18, 2005 (*EPA Mid-Atlantic Findings Presentation*), at 16, 20. http://www.aswm.org/calendar/legal/rhodes.pdf (last visited January 12, 2006).

[17] *Id. See also*, EPA Letter (EPA NHD analysis indicates that 59% of the U.S. (except Alaska) stream miles have intermittent or ephemeral flow.

[18] *Id.* at 4.

[19] *See*, Council on Environmental Quality, *Environmental Trends* (1989) at 35 (estimating that 10% of perennial streams in the United States have been channelized); *Where Rivers Are Born*, at 11.

manmade ditches draining Bay watershed wetlands are nonetheless tributaries subject to the CWA. *See, United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (*Deaton*); *Treacy v. Newdunn*, 344 F.3d 407, 417 *cert. denied* 124 S.Ct. 1874 (2004) (4th Cir. 2003) (*Newdunn*) ("Whether manmade or natural, the tributary [the I-64 ditch] flows into traditional, navigable waters.").

2. Most of the Bay watershed's wetlands are non-tidal wetlands connected to tributaries.

Approximately 1.7 million wetland acres remain in the Chesapeake Bay watershed.[20] Almost 90% (about 1.5 million acres) of these remaining wetlands are non-tidal, freshwater "palustrine" wetlands, including freshwater marshes, wet meadows, forested swamps, and bogs.[21] Forested palustrine wetlands comprise the bulk of these freshwater wetlands. These are the freshwater wetlands most likely to be considered "adjacent" for CWA purposes because they are located next to but not within the banks of freshwater lakes, streams, or rivers. Some might be considered "isolated," though most of these are connected to surface waters by groundwater.[22] Over 36,000 of these palustrine wetland acres were destroyed between 1982 and 1989 alone.[23]

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[20] *See,* Tiner, R.W., *Trends in the Chesapeake Bay Watershed Wetlands,* U.S. Fish and Wildlife Service, Ecological Services, Hadley, MA. at http://biology.usgs.gov/s+t/SNT/noframe/ne124.htm (last visited January 9, 2006) (derived from Tiner's estimate of 690,000 hectares remaining in 1989).

[21] *See,* Freshwater "Palustrine" Wetland Photo, Appendix F.

[22] *See,* Hershner, Carl et al., *Wetlands of Virginia: total, isolated and headwater,* Virginia Institute of Marine Science (VIMS) Special Report No. 03-1 (February 2003). http://ccrm.vims.edu/pubs/WetlandsOfVA203.pdf (last visited January 11, 2006).

[23] *Trends in the Chesapeake Bay Watershed Wetlands, supra.*

EPA Region III estimates that roughly 36% of its remaining wetlands are headwater wetlands.[24] About 12% of the Region's remaining wetlands are headwater wetlands that lack a perennial or intermittent surface water connection to navigable-in-fact waters.[25] These Bay area headwater wetland habitats include bogs, fens, Delmarva Bays, eastern vernal pools, and pocosins.[26]

An estimated 35-39% of the wetland acreage in the U.S. Fish and Wildlife Service's Upper Delmarva Potholes (or Bays) study area was designated "isolated," though many of these wetlands were likely to have groundwater connections to streams.[27] In addition to groundwater connections, many headwater wetlands on the Delmarva Peninsula are connected to downstream waters by drainage ditches.[28]

EPA Region III field studies show that "fully 73% of the assessed sites had groundwater pathways

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[24] EPA Region III ANPRM Response, at 9-11; *see also, EPA Mid-Atlantic Findings Presentation, supra*, at 12-14.

[25] *Id.* These numbers likely underestimate the extent of headwater wetlands because National Wetland Inventory (NWI) maps underestimate wetland acreage by up to 50%, and small headwater wetlands are the type most frequently missed by the NWI.

[26] EPA Region III ANPRM Response, Appendix I: Threatened and Endangered Species, at 1. The Delmarva bays are so named because of their location on the Delmarva Peninsula, the peninsula on the Eastern Shore of the Chesapeake Bay that includes all of Delaware as well as parts of Maryland and Virginia.

[27] Tiner, R.W., et al, Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States (Geographically Isolated Wetlands), U.S. Department of Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA. (June 2002), Section 2, Delmarva Potholes, Section 3, Region 5 Study Results at http://wetlands.fws.gov/Pubs_Reports/isolated/report_files/3_section/Results/Region_5/r5_results.htm (last visited January 6, 2006).

[28] Ator, Scott W., et al. *Hydrologic and Geochemical Controls on Pesticide and Nutrient Transport to Two Streams on the Delmarva Peninsula*. U.S. Geological Survey, Scientific Investigations Report 2004-5051. http://pubs.usgs.gov/sir/2004/5051/SIR2004-5051.pdf (last visited January 11, 2006).

connecting them to downstream water bodies." Groundwater was frequently one of several hydrological sources linking downstream waters.[29]

Importantly, EPA's field studies also found that the interrelationships between wetlands with linkages by non-perennial surface and/or groundwater flows and their surroundings require on-site inspections because these complex linkages are not displayed on widely used mapping and planning tools.[30] Consequently, while the great majority of Bay watershed headwater wetlands are connected hydrologically to downstream navigable-in-fact waters, identifying these complex connections with precision in each case for regulatory purposes is often very time and resource intensive. Petitioners' suggestion that regulators must definitively establish such a connection in each case prior to asserting jurisdiction is untenable.

C. Bay Watershed Adjacent Wetlands and Non-navigable Streams Are Essential to Restoring and Protecting the Chesapeake Bay Region.

1. Bay watershed headwater wetlands and streams filter pollutants.

Extensive phosphorus and nitrogen pollution causing eutrophication[31] is the most significant threat to Chesapeake Bay watershed restoration.[32] In 2003, 350 million pounds of nitrogen pollution and 30 million

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[29] EPA Region III ANPRM Response, Section IV. Case Study, at 1, 4.

[30] *Id.*

[31] The Chesapeake Bay Program website defines eutrophication as "the process of excess nutrients accelerating the growth of algae, oftentimes ultimately depleting the water of oxygen." http://www.chesapeakebay.net/glossary.htm (last visited January 10, 2006).

[32] Chesapeake 2000 Agreement, Water Quality Protection and Restoration, at 5.

pounds of phosphorus pollution entered the Bay through its nine major tributaries.[33]

Chesapeake Bay's headwater wetlands and streams are essential tools in combating this nutrient enrichment because they absorb, filter, and recycle this pollution, preventing eutrophication.[34] Studies have shown that non-tidal wetlands near the Chesapeake Bay removed an estimated 89% of the nitrogen pollution and 80% of the phosphorus pollution that entered the wetlands through upland runoff, groundwater, and bulk precipitation.[35] In Eastern Maryland, concentrations of nitrate pollution have been found to decrease in watersheds with a prevalence of forested wetlands.[36] Wetlands restored in an agricultural area on the

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[33] Langland, M.J. et al, *Changes in streamflow and water quality in selected nontidal sites in the Chesapeake Bay Basin, 1985-2003: U.S.Geological Survey Scientific Investigations Report 2004*-5259 (2004), at 23-27 at http://pubs.usgs.gov/sir/2004/5259/sir2004-5259.pdf (last visited January 6, 2006)) (2003 loads affected in part by high 2003 stream flow).

[34] *Wetlands of Virginia: total, isolated and headwater, citing, inter alia,* Peterjohn, W.T. and D.L. Correll, *Nutrient dynamics in an agricultural watershed: Observations on the role of a riparian forest.* Ecology 65(5): 1466-1475 (1984); *see generally*, David K. Mueller & Dennis R. Helsel, U.S. Geological Survey Circular, No. 1136, *Nutrients in the Nation's Waters – Too Much of a Good Thing?* (1996) at http://water.usgs.gov/nawqa/circ-1136/h6.html (last visited January 5, 2006).

[35] EPA Region III ANPRM Response, at Appendix D, Literature Review: Character and Function of "Isolated Wetlands," U.S. EPA, Philadelphia, PA (2003) at 13-14 *citing* Peterjohn, W.T. and D.L. Correll (1984), *supra*); *see also*, Tiner, R.W. and D.G. Burke, *Wetlands of Maryland*, U.S. Fish and Wildlife Service, Ecological Services, Region 5, Hadley, MA and Maryland Department of Natural Resources, Annapolis, MD (1995) at 146-147 (the "riparian forest" in the 1984 Peterjohn and Correll study was later recognized to be part of a wetland continuum).

[36] Phillips, P.J. et al, *Effect of Forested Wetlands on Nitrate Concentrations in Ground Water and Surface Water on the Delmarva Peninsula*, 13 Wetlands 75-83 (1993).

Delmarva Peninsula removed an average of 68% of nitrate nitrogen.[37]

As the 4th Circuit explained in *United States v. Deaton*, the filtering effect of wetlands is actually reversed, releasing trapped pollutants back into surface and groundwater, when wetlands are drained and developed. *Deaton*, 209 F.3d at 336 (citing Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation*, 48-50, 124 (1984)). The *Deaton* Court recognized that protecting and restoring the Chesapeake Bay's adjacent wetlands and non-navigable tributaries is essential to reducing pollution downstream in the Chesapeake Bay and its major tributaries.

2. Bay watershed headwater wetlands and streams are essential for pure drinking water supplies.

Between 148 and 526 surface drinking water intakes, serving populations ranging from 535,000 to 3 million people, are located in non-navigable headwaters in Chesapeake Bay states.[38] The headwaters of the Potomac River and other Chesapeake Bay tributaries serve as a natural filter for drinking water, much like "a giant Brita."[39] Residents of the Delmarva Peninsula rely on ground water aquifers for drinking water and other water supplies, at least some of which are vulnerable to contamination from pollutants discharged into headwater wetlands, streams, and ditches.[40]

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[37] Jordan, T.E. et al., Restored Wetlands in Crop Fields Control Nutrient Runoff in Nutrient Cycling and Retention in natural and Constructed Wetlands, pp 49-60.

[38] EPA Region III ANPRM comments at 7-8, Section II, GIS Highlights; *see*, Drinking Water Intake Map, Appendix G; *see also*, *EPA Mid-Atlantic Findings Presentation*, *supra*, at 8-11; EPA Letter, *supra*..

[39] Mary Battiata, *Silent Streams*, Washington Post (Sunday, November 27, 2005; W10).

[40] *See Hydrologic and Geochemical Controls*, *supra*, at Section 2, Delmarva Potholes.

Removal of the source water protection measures afforded by the CWA would increase risks to human health, and will require additional infrastructure expenditures by public utilities using surface water intakes.[41] For example, if CWA jurisdiction is removed for first order streams, untreated or partially treated municipal sewage or animal waste discharged upstream of a drinking water intake could contaminate water supplies with pathogens such as *Cryptosporidium* and *E.Coli* that are hardy and resistant to treatment. Many EPA Region III sewage treatment plants are located on first or second order streams. Unless these plants are closely regulated, these pathogens, routinely found in human sewage, can show up in finished tap water.[42] Removal of federal jurisdiction over such waters would impair the ability of states and the federal government to monitor and control the level of discharges to these waters.[43]

3. Bay watershed headwater wetlands and streams reduce sediment loads downstream.

Chesapeake Bay watershed headwater streams and wetlands slow and hold run-off and sediment upstream, reducing channel erosion and sediment loads downstream. Conversely, when headwater wetlands and streams are altered, they retain less sediment and send

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[41] Region III ANPRM Response at 7.

[42] *Id.* at 8, 27.

[43] *See, infra*, at Part II (regarding the need for a federal umbrella for downstream states like Maryland (the Susquehanna) and Virginia (the Potomac).

more sediment downstream.[44] Increased sediment loads downstream reduce water clarity and habitat quality.[45]

Increased sediment loads from headwaters and smaller streams also adversely affect the navigability of downstream waters. Loss or lack of regulation of these important filtering areas will result in the need for more extensive and recurrent dredging.[46] For example, "keeping Baltimore Harbor navigable costs $10 to $11.5 million annually to dredge and dispose of sediment the Patapsco River [a Bay tributary] deposits in the harbor."[47]

4. Bay watershed headwater wetlands and streams and moderate flood flows.

Chesapeake Bay headwater wetlands and streams provide for the graduated release of surface and groundwater flows, holding back heavy surface water

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[44] *See*, Herman, J., Hupp, C., and Langland, M., *Chapter 4. Watershed Sediment Deposition and Storage* in *A Summary Report of Sediment Processes in Chesapeake Bay and Watershed*, U.S. Geological Survey Water Resources Investigations Report 03-4123, New Cumberland, PA (2003), at 43-45; EPA Region III ANPRM Response at 14-18, Appendix E at 7-9.

[45] *See*, Chesapeake Bay Program, *Background: Sediment and the Bay* at http://www.chesapeakebay.net/sediment.htm (last visited January 7, 2006); U.S. EPA Region III, *Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chrlorophyll a for the Chesapeake Bay and Its Tidal Tributaries*, EPA 903-R-03-002 (April 2003), Executive Summary at xii-xiii. http://www.chesapeakebay.net/pubs/waterqualitycriteria/12022002/Executive_Summary.pdf (last visited January 7, 2006); Koroncai, Robert et al., *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The collaborative process, technical tools, and innovative approaches*, EPA 903-R-03-007. U.S. EPA Region III Chesapeake Bay Program Office, Annapolis, MD (December 2003) at Executive Summary, xiii. http://www.chesapeakebay.net/pubs/doc-allocating-front.pdf (last visited January 7, 2006).

[46] EPA Region III ANPRM Response, at 8.

[47] Where Rivers are Born, at 12.

flows during storm events, and releasing base flow through groundwater during dry periods.[48]

The U.S. Fish and Wildlife Service study of the Delmarva Potholes (Delmarva Bays) reports:

> Given their abundance, Delmarva potholes aid in temporary storage of
>
> surface water and thereby help reduce local flooding. They alternately
>
> serve as ground-water discharge (wet season) and recharge (dry season)
>
> areas, with some recharge water eventually discharging into coastal plain
>
> streams and contributing to base flows vital for sustaining aquatic biota.[49]

Conversely, destruction of these headwater wetlands and streams will contribute to larger flood flows downstream,[50] and decreased base flow to streams, reducing water quality and harming aquatic flora and fauna.[51] Growth in storm sewers and paved surfaces around Watts Branch, Maryland more than tripled the

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[48] *See e.g.*, EPA Region III ANPRM Response at 14-18, Appendix D. at 10-13, and Appendix E at 7-9; *Where Rivers Are Born* at 10-11; Winter, T. *et al.*, *Groundwater and Surface Water: A Single Resource*, U.S. Geological Survey Circular 1139, 67 (1998). http://pubs.usgs.gov/circ/circ1139/ (last visited January 11, 2006).

[49] Tiner, R.W. Geographically Isolated Wetlands of the United States, Wetlands, Vol. 23 (3), 494-516, at 505 (citations omitted); see also, Hydrologic and Geochemical Controls on Pesticide and Nutrient Transport to Two Streams on the Delmarva Peninsula, supra.

[50] *See e.g.*, EPA Region III ANPRM at 8, 16-18, Appendix E at 9 *citing* Meyer and Wallace (2001); *Where Rivers are Born*, at 10-11.

[51] *See*, EPA Region III ANPRM Response, at 16-17, Appendix D at 14, Appendix E at 9; *Where Rivers Are Born* at 11; *Groundwater and Surface Water: A Single Resource.*, *supra*, at 67.

number of floods and increased average annual flood size by 23 percent.[52]

5. Bay area non-navigable tributaries and adjacent wetlands support the Bay area's fisheries and shell-fisheries.

Non-tidal wetlands throughout the Bay watershed provide essential services to finfish and shellfisheries in the Chesapeake Bay. For example, Maryland's non-tidal wetlands support numerous fish (menhaden and striped bass) and shellfish (blue crabs and oysters) species, either directly by providing habitat, or indirectly by regulating freshwater flow and filtering pollutants. Approximately 200 fish species use Chesapeake Bay waters.[53] Maryland's non-tidal seasonal and temporarily flooded wetlands provide spawning, feeding, and nursery habitat for some freshwater fish species during flooding periods, and some also appear to be important in supporting the invertebrate food base for Maryland's riverine fisheries.[54] Bay watershed non-tidal wetlands and tributaries support a healthy freshwater sport fishery. In 2001, 367,000 resident and non-resident anglers fished in Maryland's fresh waters. Over 720,000 fished in Virginia's.[55]

The American eel is commercially important fish species that relies on the upstream non-navigable tributaries of the Chesapeake Bay watershed. The eel

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[52] Meyers, J.L. and J.B. Wallace, *Lost Linkages and Lotic Ecology: Rediscovering Small Streams*. Pages 295-317, at 307, *citing* Leopold, L.B., *A View of the River*. Cambridge, Mass: Harvard University Press, in M.C. Press, N.J. Huntly and S. Levin, editors. *Ecology: Achievement and Challenge*. Blackwell Science.

[53] *Wetlands of Maryland*, at 141.

[54] *Id.* at 141-142; *see also*, EPA Region III ANPRM Response, Appendix E at 18.

[55] U.S. Fish and Wildlife Service, *2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, 108 (2001), available at http://www.census.gov/prod/2003pubs/fhws01-us.pdf (last visited January 5, 2006).

lives most of its life in the inland reaches of these upstream waters and then goes to sea to spawn. The Bay area commercial harvest was about 700,000 pounds in 1981.[56] The Maryland commercial harvest was just over 192,000 pounds in 2002.[57] Loss of headwater streams due to unchecked development will eliminate essential eel habitat and will result declining catch.

Bay headwaters and other non-navigable tributaries and adjacent wetlands provide essential water quality and quantity functions that support the Chesapeake Bay's striped bass, shad, and perch fisheries, among others, by regulating freshwater flow and filtering pollutants, helping protect critical spawning and nursery habitat for these species. The upper reaches of Chesapeake Bay tidal waters and the upper mainstem are used as spawning and nursery grounds for striped bass, shad, perch and other fish. The importance of this use is reflected in state and federal water quality standards that assign a "migratory fish spawning and nursery" designated use to these waters.[58]

The major tributaries of the Chesapeake Bay support 70-90% of the striped bass spawned on the East Coast.[59] The 2002 commercial harvest in Maryland alone

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[56] *See*, Chesapeake Bay Program, Fish: American Eel at http://www.chesapeakebay.net/baybio.htm (last visited January 10, 2006).

[57] Maryland's Commercial Fisheries Annual Landings Data Set: American Eel/Common Eel, at http://mddnr.chesapeakebay.net/mdcomfish/mdcomfishery.html (last visited January 10, 2006).

[58] *See, Ambient Water Quality Criteria, supra*; Chesapeake Bay Program Powerpoint Presentation at www.chesapeakebay.net/pubs/waterqualitycriteria/DOC-nspresentation.ppt at slide 28, 31. EPA has published water quality standards for the Bay and tidal tributaries. http://www.chesapeakebay.net/pubs/waterqualitycriteria/12022002/cover.pdf.

[59] Chesapeake Bay Program, *Animals and Plants: Striped Bass* at http://www.chesapeakebay.net/striped_bass.htm (last visited January 7, 2006).

was over 1.8 million pounds.[60] Another important Chesapeake Bay commercial fishery is the menhaden fishery. This fishery is highlighted for protection in the Bay through the "open water and shellfish" designated use.[61] The village of Reedville, Virginia on the Bay was reported as the second-largest port in the Nation in terms of catch landed in 2004. Federal figures show 400.5 million pounds of fish were unloaded there that year, trailing only Dutch Harbor, Alaska.[62] About 97% of the Chesapeake Bay area fish harvest is estuarine dependent.[63] In 2004, the Chesapeake Bay area harvest in Maryland and Virginia for all fish species was over 500 million pounds and was valued at over $209 million.[64]

Bay watershed headwaters and other non-navigable tributaries and adjacent wetlands support the Bay's world renowned shellfishery by reducing nitrogen and phosphorus pollution and sediment loads in downstream waters, and thereby fostering growth of submerged aquatic vegetation ("SAV") with increased water clarity and increases in dissolved oxygen from

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[60] Maryland's Commercial Fisheries Annual Landings Data Set: Striped Bass, at http://mddnr.chesapeakebay.net/mdcomfish/mdcomfishery.html (last visited January 10, 2006).

[61] *See*, Chesapeake Bay Program Powerpoint Presentation, *supra*, at slide 34.

[62] National Marine Fisheries Service, *Fisheries of the United States 2004*, Current Fisheries Statistics No. 2004, Silver Spring, MD (November 2005), at U.S. Commercial Landings, 2, 7. http://www.st.nmfs.gov/st1/fus/fus04/02_commercial2004.pdf (last visited January 10, 2006).

[63] *See, Ambient Water Quality Criteria*, *supra*; Chesapeake Bay Program Powerpoint Presentation, *supra*, at slides 28, 31.

[64] National Marine Fisheries Service, *Fisheries of the United States 2004*, Current Fisheries Statistics No. 2004, Silver Spring, MD (November 2005), at U.S. Commercial Landings. http://www.st.nmfs.gov/st1/fus/fus04/02_commercial2004.pdf (last visited January 10, 2006).

reductions in nitrogen and phosphorus pollution loads.[65] SAV provides essential habitat for immature and molting blue crabs.

Oyster and blue crab commercial harvests have declined since the 1970s due to the combined effects of several factors including pollution and the loss of SAV. Still, the Chesapeake Bay remains one of the world's largest producers of blue crabs. The Chesapeake region blue crab harvest in 2004 was 58.4 million pounds, worth over $44 million.[66] Currently, the combined value of the Chesapeake's shellfish and finfish harvests is estimated around $1 billion annually.[67] The Chesapeake Bay fisheries so central to the region's culture and economy are clearly placed in harm's way by the removal of CWA protections upstream.

6. Bay area adjacent wetlands and non-navigable streams support waterfowl and other migratory bird populations.

The Chesapeake Bay watershed is home to 29 species of waterfowl and is a major resting ground along the Atlantic Migratory Bird Flyway.[68] At one time, millions of waterfowl spent their winters in the Bay region, supported by profuse SAV beds and supplemental

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[65] *See, Ambient Water Quality Criteria, supra*; *see also*, Chesapeake Bay Program Powerpoint Presentation, *supra*, at slides 32, 36.

[66] *Fisheries of the United States 2004, supra*, at Review. http://www.st.nmfs.gov/st1/fus/fus04/01_intro2004.pdf (last visited January 10, 2006).

[67] Northeast Midwest Institute, *Large Scale Ecosystem Restoration Initiatives – Protecting and Restoring the Chesapeake Bay*, (2005) at "Ecosystem Users". www.nemw.org/chesapeake.htm (last visited January 7, 2006).

[68] *Wetlands of Maryland, supra*, at 142 (One third of all waterfowl using the Atlantic Flyway find winter habitat in the Chesapeake Bay and its wetlands); *see also*, Chesapeake Bay Program, *Waterfowl*. http://www.chesapeakebay.net/waterfowl.htm (last visited January 7, 2006); *Large Scale Ecosystem Restoration Initiatives – Protecting and Restoring the Chesapeake Bay, supra*, at "About the Ecosystem".

diets rich in invertebrates. Many of the bird and waterfowl species identified in Maryland regularly use vegetated non-tidal wetlands, and a significant number of these depend on these habitats for survival.[69] The destruction of wetlands, and dramatic declines in SAV and water quality, among other things, have reduced the number of waterfowl in the Bay area to about one million birds.[70] Loss of SAV and non-tidal wetland habitat must be reversed to protect and restore the waterfowl and other migratory bird populations of the Chesapeake Bay watershed – and the entire Atlantic Migratory Bird Flyway.

II. CWA JURISDICTION THROUGHOUT THE WATERSHED IS ESSENTIAL TO ACHIEVING THE COMMITMENTS OF THE CHESAPEAKE BAY AGREEMENTS

A. Federal and State Partners Recognize the Importance of Broad Clean Water Act Jurisdiction to Bay Watershed Restoration.

The argument that states alone can best protect their non-navigable tributaries and adjacent wetlands rings hollow in the Chesapeake Bay watershed. The CWA requires the Bay states, like all others in the Nation, to identify waters within their respective boundaries that were impaired, 33 U.S.C. § 1313, and to develop plans for removing those impairments. The states of Maryland, Pennsylvania, and Virginia, the District of Columbia and the United States recognized in the 1970s, that they could not solve the dire problems facing their rivers, streams and the Chesapeake Bay alone or in piecemeal fashion. Thus, they entered into an historic compact, the Chesapeake Agreement of 1983. That agreement was reaffirmed and strengthened in similar agreements signed in 1987 and 2000. Congress

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[69] *Wetlands of Maryland, supra*, at 142-144.

[70] *Id.*

recognized the need for these agreements and the cooperative federalism principle [71] they embody by passing legislation which created the Chesapeake Bay Program, under the auspices of the EPA, and authorizing the expenditure of a significant amount of federal funds to support those agreements. 42 U.S.C. § 1267.[72] Recognizing the importance of pollution reduction in the headwaters of the Bay watershed, the "headwater states" of Delaware, New York, and West Virginia have joined the Chesapeake Bay partnership through a memorandum of understanding.[73]

The state and federal signatories to the Chesapeake Bay Agreements recognize that the fate of the Chesapeake Bay ecosystem and watershed depend upon the willingness and capability of the six watershed states and the District of Columbia to significantly reduce nitrogen, phosphorus, and sediment loads throughout the Chesapeake Bay watershed.[74] The Chesapeake Bay partners recognize that they cannot achieve these nutrient and sediment reductions without the federal resources and uniform federal regulatory framework supplied by the Clean Water Act.[75]

B. The Chesapeake Bay Partners Must Apply the Clean Water Act Throughout the Watershed to Restore the Chesapeake Bay.

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[71] See, Weiser, J, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C.L. Rev. 663 (2001); Comment: This Dog Has Teeth . . . Cooperative Federalism and Environmental Law, 16 Vill. Envtl. L.J. 109 (2005).

[72] *See*, 33 U.S.C. § 1267(j), P.L. 106-457, Title II, §202-203 (Nov. 7, 2000).

[73] Chesapeake Bay Watershed Partners Agreement (2001), *supra*, and Appendix H.

[74] *See*, discussion of nitrogen and phosphorus and sediment load allocations, *infra*, at Part II.C.2.

[75] *See e.g., Chesapeake 2000* at 5.

1. The Bay partners need broad Clean Water Act jurisdiction to improve water quality.

The 2000 Chesapeake Bay Agreement states unequivocally that *"[i]mproving water quality is the most critical element of the overall protection and restoration of the Chesapeake Bay and its tributaries."* These water quality improvements are necessary to, among other things, protect and restore the Bay's fisheries. [76]

The partners leave no doubt that the implementation of the CWA water quality standards and waste allocation provisions throughout the watershed is essential to achieving the Agreement's central water quality restoration commitment:

> Recent actions taken under the Clean Water Act resulted in listing portions
>
> of the Chesapeake Bay and its tidal rivers as 'impaired waters.' *These*
>
> *actions have emphasized the regulatory framework of the Act along with the ongoing cooperative efforts of the Chesapeake Bay Program as the means to address the nutrient enrichment problems of the Bay and its rivers* .... We
>
> have agreed to the goal of improving water quality in the Bay and its
>
> tributaries so that these waters may be removed from the impaired waters
>
> list prior to the time when regulatory mechanisms under Section 303(d)
>
> of the Clean Water Act would be applied.[77]

The Bay partners have further agreed that a regulatory TMDL covering the entire 64,000 square mile

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[76] *Chesapeake 2000* at 2.

[77] *Id.* (emphasis added).

Bay watershed will be put in place by 2011 if Bay water quality is not restored by 2010.[78] However, without the broad federal framework of the CWA upon which each of the signatories to the Bay Agreements could base their independent regulatory actions, the commitments made in these agreements could not be achieved. Restricting CWA jurisdiction to the largest Bay tributaries and their adjacent wetlands will make it nearly impossible for the Bay partners to meet the revised water quality standards and waste allocations necessary to achieve their water quality restoration commitments.[79]

2. The Bay partners need broad Clean Water Act jurisdiction to protect and restore vital wetlands and SAV areas.

The Chesapeake Bay partners recognize that to restore the living resources of the Bay, they must protect and restore the Bay's "natural infrastructure": its "thousands of miles of river and stream habitat that interconnect the land, water, living resources and human communities of the Bay watershed." The partners recognize, in particular, the importance of protecting and restoring SAV, wetlands, streams, and riparian forests for their erosion reduction and water quality filtration capabilities.[80] SAV restoration will require more stringent water clarity standards and strategies. Increasing water clarity requires decreasing nutrient and sediment loads.[81] Headwater wetlands and streams contribute to improving water clarity in the Bay.

The Bay partners commit to "achieve a no-net loss of existing wetlands acreage and function in the

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[78] *See e.g.*, Chesapeake Bay Program, *Water Quality Protection and Restoration: The Comprehensive Approach to Restoring Bay Water Quality* at www.chesapeakebay.net/info/wqcriteriatech/index.cfm at 2 (last visited January 7, 2006).

[79] *See*, EPA Region III ANPRM Response at 23.

[80] *Chesapeake 2000*, Vital Habitat Protection and Restoration, at 3-5.

[81] *Id.* at 3-4.

signatories' regulatory programs."[82] This commitment cannot be honored without CWA jurisdiction that extends to non-navigable tributaries and their adjacent wetlands. The District of Columbia has no independent regulatory program that can ensure no-net-loss of wetlands within its boundaries. Neither does West Virginia. New York's wetlands program does not regulate many non-tidal wetlands under 12.4 acres in size.[83]

While Maryland, Virginia, and Pennsylvania do have independent wetlands regulatory programs, their success in ensuring no-net-loss of existing wetlands depends to no small extent on the uniform federal "no-net-loss" standard. The federal §404 program also provides important support for these state programs, sharing the burdens of wetland delineation, functional assessment, permit review and enforcement. Narrowing CWA jurisdiction will shift more of the economic burden for regulating headwaters and other adjacent wetlands and non-navigable tributaries to state and local governments. [84]

C. Clean Water Act Jurisdiction Throughout the Watershed is Essential to Achieve the Stricter Water Quality Standards and Load Allocations Necessary to "Save the Bay."

1. CWA jurisdiction drives the stricter water quality standards and waste load allocations needed throughout the Bay watershed.

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[82] *Id.* at 4-5.

[83] *See e.g.*, Association of State Wetlands Managers, State Wetland Programs at http://aswm.org/swp/statemainpage9.htm (last visited January 7, 2006).

[84] *See e.g.*, EPA Region III ANPRM Response at 20, Appendix K: State Programs in Region III; *see also*, ASWM Br.and the Amicus Brief of the States of New York and Michigan et al.

Clean Water Act-mandated water quality standards are central to meeting the CWA mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). EPA acts as an important federal backstop for state promulgation and implementation of state water quality standards, ensuring that state standards are consistent with the CWA. If the CWA no longer extends to non-navigable streams and adjacent wetlands, the applicability of water quality standards to these waters is open to question, and EPA's ability to ensure that state water quality standards will achieve the requirements of the CWA would be undermined.[85]

CWA §303(d) requires states to list as "impaired waters" those waters that are not meeting state water quality standards, and to develop and execute Total Maximum Daily Loads (TMDLs) to bring those impaired waters back into compliance with state water quality standards. A TMDL defines the pollutant load that a waterbody can assimilate without triggering violations of water quality standards and then allocates the loading of each pollutant of concern to specific contributing point sources (e.g, industrial and municipal waste water treatment plants) and non-point sources (e.g., agricultural run-off). TMDLs for downstream impaired waters will fail to meet water quality standards if the TMDLs cannot limit pollutant loadings in upstream tributaries and adjacent wetlands.[86]

CWA NPDES (§402) permitting goes hand-in-hand with implementing TMDLs. The TMDL waste load allocations for point source discharges are implemented through NPDES permits. If NPDES permits are no longer required for facilities discharging into upstream tributaries, then it will be difficult to assign and enforce

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[85] EPA Region III ANPRM Response, at 22.

[86] *Id.* at 22-25.

waste load allocations to such facilities.[87] Because pollutant loadings are often in small streams, exclusion of these smaller upstream tributaries from NPDES permits and TMDL allocations would result in an inability to control water quality in large mainstem waters.[88]

Environmental Amici present a graphic illustration of this pollution risk: photographs of two District of Columbia sewer outfalls into two small tributaries of Rock Creek and the Potomac River. Presently, these sewer outfalls require NPDES permits that limit pollution discharges, including raw sewage, to downstream waters. Under Petitioner Rapanos' theory of this case, these outfalls would no longer require NPDES permits and water quality in Rock Creek and downstream would suffer.[89]

Baywide, sewage treatment plants contribute 19% of the nitrogen that flows into the Bay each year.[90] The Chesapeake Bay Program has reported that where Bay watershed municipal wastewater treatment plants have reduced nitrogen discharges to comply with a nitrogen limit in an NPDES permit, it is because the limit has been imposed through a local TMDL in one of the many Bay sub-basins.[91] Without the NPDES and TMDL

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[87] *See*, Region III ANPRM Response, Appendix. J at 2 and Table 1, Sample of Current NPDES Permits on Small Streams.

[88] Region III ANPRM Response at 23. *See also*, EPA Letter, *supra* note 17 (EPA estimate that over 40% of NPDES permits are for discharges of pollutants into non-navigable streams (excluding Alaska). About 28% of these are from municipal sewage treatment systems. The rest are from an array of over 500 industrial categories).

[89] *See*, Amicus Brief of American Rivers, et al, at 12 and Appendix A.

[90] *See*, Chesapeake Bay Program Tributary Strategies Backgrounder at 2: http://www.chesapeakebay.net/pubs/tribstrats_backgrounder_final.pdf . (last visited January 7, 2006).

[91] Chesapeake Bay Program, *What's the Status of Point Source Nitrogen Reduction in the Chesapeake Bay Watershed?* (January 2004). http://www.chesapeakebay.net/pubs/waterqualitycriteria/doc-pointsource_for_tribtools.pdf. (last visited January 7, 2006).

requirements, nitrogen discharges into upstream tributaries will be impossible to adequately control.

2. The Bay partners cannot achieve the necessary pollution reductions without CWA jurisdiction over non-navigable tributaries and adjacent wetlands.

In order to achieve their restoration requirements, particularly the stricter water quality standards necessary to protect migratory fish spawning and nursery use and shellfish use, the six Bay watershed states and the District of Columbia recently agreed to substantially reduce nutrient pollution below 2000 levels by 2010. The new nitrogen reduction requirement is to reduce annual loads to no more than 175 million pounds. The new phosphorus reduction requirement is to reduce annual loads to no more than 12.8 million pounds.[92] The partners have also agreed to reduce annual loads of land-based sediment to no more than 4.15 million tons in order to reduce sediment loads enough to provide the water clarity necessary for underwater grasses to thrive.[93]

To achieve these ambitious pollution reduction commitments all six Bay watershed states and the District of Columbia must "pull their weight".[94] The Chesapeake Bay Program ran simulation models to determine the maximum load allocations for each of the

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[92] *Setting and allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, Executive Summary, *supra*; *see also*, Chesapeake Bay Program Powerpoint Presentation, *supra*, slide 53.

[93] *Id.* See also, Chesapeake 2000 Agreement at 4-6; Setting and allocating the Chesapeake Bay Basin Nutrient and Sediment Loads, Executive Summary, *supra*.

[94] *See e.g.*, Maryland Water Quality Standards –COMAR 26.08.02; Virginia Water Quality Standards, at 9 VAC 25—260.

nine major watershed basins, including the New York headwaters of the Susquehanna.[95]

Tributary strategies to meet these maximum nutrient and sediment load allocations are being developed and implemented for each subwatershed within the nine major Bay tributary basins. These tributary strategies will include, among other actions, facility-by-facility assessments of what additional pollution reduction actions will be required for point sources. The states are developing nutrient pollution-related water quality standards. These standards, together with the tributary strategies, will form the basis of NPDES permit requirements for point source facilities. For nitrogen reductions, the most important point source facilities will be the 310 municipal wastewater treatment plants in the Bay watershed.[96]

If the Court decides to remove from CWA jurisdiction over half of the Bay watershed's stream miles and over one third of the watershed's adjacent wetlands, it will be virtually impossible for the Chesapeake Bay watershed states and the District of Columbia to achieve the nutrient and sediment requirements that must be met to Save the Bay. The exercise in cooperative federalism that is the Chesapeake Bay Program and Agreements will have failed.

III. THE UNITED STATES PROPERLY ASSERTS JURISDICTION OVER TRIBUTARIES AND THEIR ADJACENT WETLANDS "INSEPARABLY BOUND UP" WITH NAVIGABLE WATERS.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-135 (1985) (*Riverside Bayview*), the Court recognized that Congress intended to regulate

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[95] *Setting and allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, Executive Summary, *supra*.

[96] *See, What's the Status of Point Source Nitrogen Reduction in the Chesapeake Bay Watershed?*, *supra*.

wetlands "inseparably bound up with the waters of the United States," and upheld the Army Corps of Engineers' exercise of CWA jurisdiction over adjacent wetlands on that basis. The Court approved this *Riverside Bayview* adjacency holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167-168 (2001) (*SWANCC*), while narrowly holding that CWA jurisdiction did not extend to certain truly isolated intrastate ponds. The *Riverside Bayview* holding applies with equal force in this case, where the wetlands at issue drain or "tend to drain" to non-navigable tributaries that are hydrologically and ecologically bound up with downstream navigable waters. *See, United States v. Rapanos*, 376 F. 3d 629, 642-43 (6th Cir. 2004); *Carabell v. U.S. Army Corps of Engineers*, 391 F. 3d 704, 705-706, 708 (6th Cir. 2004); JA Vol. 3 at 639: 16-23 (testimony at wetland application hearing). As in *Riverside Bayview*, the Corps of Engineers properly asserted jurisdiction over the wetlands at issue in these cases.

CONCLUSION

The Chesapeake Bay ecosystem and the Chesapeake Bay Agreements demonstrate that the extensive networks of non-navigable tributaries and adjacent wetlands located upstream in watersheds are inseparably bound up with downstream navigable waters, and that the Clean Water Act goal of maintaining and restoring the physical, chemical, and biological integrity of the Nation's waters cannot be met unless these upstream waters continue to be subject to the Act. For the reasons set forth above, Amicus Curiae the Chesapeake Bay Foundation respectfully requests that the Court affirm the decisions of the Sixth Circuit.

RESPECTFULLY SUBMITTED,

Jan Goldman-Carter
Attorney at Law
4504 Casco Avenue
Edina, MN 55424
(952) 922-2003

Counsel of Record for
The Chesapeake Bay
Foundation, Inc.

Jon A. Mueller
Director of Litigation
The Chesapeake Bay
Foundation, Inc.
6 Herndon Ave.
Annapolis, MD 21403
(443) 482-2162

Counsel of Record for
The Chesapeake Bay
Foundation, Inc.

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CHESAPEAKE 2000

PREAMBLE

The Chesapeake Bay is North America's largest and most biologically diverse estuary, home to more than 3,600 species of plants, fish and animals. For more than 300 years, the Bay and its tributaries have sustained the region's economy and defined its traditions and culture. It is a resource of extraordinary productivity, worthy of the highest levels of protection and restoration.

Accordingly, in 1983 and 1987, the states of Virginia, Maryland, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission and the U.S. Environmental Protection Agency, representing the federal government, signed historic agreements that established the Chesapeake Bay Program partnership to protect and restore the Chesapeake Bay's ecosystem.

For almost two decades, we, the signatories to these agreements, have worked together as stewards to ensure the public's right to clean water and a healthy and productive resource. We have sought to protect the health of the public that uses the Bay and consumes its bounty. The initiatives we have pursued have been deliberate and have produced significant results in the health and productivity of the Bay's main stem, the tributaries, and the natural land and water ecosystems that compose the Chesapeake Bay watershed.

While the individual and collective accomplishments of our efforts have been significant, even greater effort will be required to address the enormous challenges that lie ahead. Increased population and development within the watershed have created ever-greater challenges for us in the Bay's restoration. These challenges are further complicated by the dynamic nature

of the Bay and the ever-changing global ecosystem with which it interacts.

In order to achieve our existing goals and meet the challenges that lie ahead, we must reaffirm our partnership and recommit to fulfilling the public responsibility we undertook almost two decades ago. We must manage for the future. We must have a vision for our desired destiny and put programs into place that will secure it.

To do this, there can be no greater goal in this recommitment than to engage everyone — individuals, businesses, schools and universities, communities and governments — in our effort. We must encourage all citizens of the Chesapeake Bay watershed to work toward a shared vision — a system with abundant, diverse populations of living resources, fed by healthy streams and rivers, sustaining strong local and regional economies, and our unique quality of life.

In affirming our recommitment through this new *Chesapeake 2000,* we recognize the importance of viewing this document in its entirety with no single part taken in isolation of the others. This Agreement reflects the Bay's complexity in that each action we take, like the elements of the Bay itself, is connected to all the others. This Agreement responds to the problems facing this magnificent ecosystem in a comprehensive, multifaceted way.

BY THIS AGREEMENT, we commit ourselves to nurture and sustain a Chesapeake Bay Watershed Partnership and to achieve the goals set forth in the subsequent sections. Without such a partnership, future challenges will not be met. With it, the restoration and protection of the Chesapeake Bay will be ensured for generations to come.

WE COMMIT TO:

LIVING RESOURCE PROTECTION AND RESTORATION

The health and vitality of the Chesapeake Bay's living resources provide the ultimate indicator of our success in the restoration and protection effort. The Bay's fisheries and the other living resources that sustain them and provide habitat for them are central to the initiatives we undertake in this Agreement.

We recognize the interconnectedness of the Bay's living resources and the importance of protecting the entire natural system. Therefore, we commit to identify the essential elements of habitat and environmental quality necessary to support the living resources of the Bay, In protecting commercially valuable species, we will manage harvest levels with precaution to maintain their health and stability and protect the ecosystem as a whole. We will restore passage for migratory fish and work to ensure that suitable water quality conditions exist in the upstream spawning habitats upon which they depend.

Our actions must be conducted in an integrated and coordinated manner. They must be continually monitored, evaluated and revised to adjust to the dynamic nature and complexities of the Chesapeake Bay and changes in global ecosystems. To advance this ecosystem approach, we will broaden our management perspective from single-system to ecosystem functions and will expand our protection efforts by shifting from single-species to multi-species management. We will also undertake efforts to determine how future conditions and changes in the chemical, physical and biological attributes of the Bay will affect living resources over time.

GOAL

Restore, enhance and protect the finfish, shellfish and other living resources, their habitats and ecological relationships to sustain all fisheries and provide for a balanced ecosystem.

Oysters

- By 2010, achieve, at a minimum, a tenfold increase in native oysters in the Chesapeake Bay, based upon a 1994 baseline. By 2002, develop and implement a strategy to achieve this increase by using sanctuaries sufficient in size and distribution, aquaculture, continued disease research and disease-resistant management strategies, and other management approaches.

Exotic Species

- In 2000, establish a Chesapeake Bay Program Task Force to:

    1. Work cooperatively with the U.S. Coast Guard, the ports, the shipping industry, environmental interests and others at the national level to help establish and implement a national program designed to substantially reduce and, where possible, eliminate the introduction of non-native species carried in ballast water; and

    2. By 2002, develop and implement an interim voluntary ballast water management program for the waters of the Bay and its tributaries.

- By 2001, identify and rank non-native, invasive aquatic and terrestrial species which are causing

or have the potential to cause significant negative impacts to the Bay's aquatic ecosystem. By 2003, develop and implement management plans for those species deemed problematic to the restoration and integrity of the Bay's ecosystem.

Fish Passage and Migratory and Resident Fish

- By June 2002, identify the final initiatives necessary to achieve our existing goal of restoring fish passage for migratory fish to more than 1,357 miles of currently blocked river habitat by 2003 and establish a monitoring program to assess outcomes.

- By 2002, set anew goal with implementation schedules for additional migratory and resident fish passages that addresses the removal of physical blockages. In addition, the goal will address the removal of chemical blockages caused by acid mine drainage. Projects should be selected for maximum habitat and stock benefit

- By 2002, assess trends in populations for priority migratory fish species. Determine tributary-specific target population sizes based upon projected fish passage, and current and projected habitat available, and provide recommendations to achieve those targets.

- By 2003, revise fish management plans to include strategies to achieve target population sizes of tributary-specific migratory fish.

Multi-species Management

- By 2004, assess the effects of different population levels of filter feeders such as menhaden, oysters and clams on Bay water quality and habitat.

- By 2005, develop ecosystem-based multi-species management plans for targeted species.

- By 2007, revise and implement existing fisheries management plans to incorporate ecological, social and economic considerations, multi-species fisheries management and ecosystem approaches.

Crabs

- By 2001, establish harvest targets for the blue crab fishery and begin implementing complementary state fisheries management strategies Baywide. Manage the blue crab fishery to restore a healthy spawning biomass, size and age structure.

VITAL HABITAT PROTECTION AND RESTORATION

The Chesapeake Bay's natural infrastructure is an intricate system of terrestrial and aquatic habitats, linked to the landscapes and the environmental quality of the watershed. It is composed of the thousands of miles of river and stream habitat that interconnect the land, water, living resources and human communities of the Bay watershed. These vital habitats—including open water, underwater grasses, marshes, wetlands, streams and forests—support living resource abundance by providing key food and habitat for a variety of species. Submerged aquatic vegetation reduces shoreline erosion while forests and wetlands protect water quality by naturally processing the pollutants before they enter the water. Long-term protection of this natural infrastructure is essential.

In managing the Bay ecosystem as a whole, we recognize the need to focus on the individuality of each river, stream and creek, and to secure their protection in concert with the communities and individuals that reside

within these small watersheds. We also recognize that we must continue to refine and share information regarding the importance of these vital habitats to the Bay's fish, shellfish and waterfowl. Our efforts to preserve the integrity of this natural infrastructure will protect the Bay's waters and living resources and will ensure the viability of human economies and communities that are dependent upon those resources for sustenance, reverence and posterity.

GOAL

Preserve, protect and restore those habitats and natural areas that are vital to the survival and diversity of the living resources of the Bay and its rivers.

Submerged Aquatic Vegetation

- Recommit to the existing goal of protecting and restoring 114,000 acres of submerged aquatic vegetation (SAV).

- By 2002, revise SAV restoration goals and strategies to reflect historic abundance, measured as acreage and density from the 1930s to the present. The revised goals will include specific levels of water clarity which are to be met in 2010. Strategies to achieve these goals will address water clarity, water quality and bottom disturbance.

- By 2002, implement a strategy to accelerate protection and restoration of SAV beds in areas of critical importance to the Bay's living resources.

Watersheds

- By 2010, work with local governments, community groups and watershed organizations to develop

and implement locally supported watershed management plans in two-thirds of the Bay watershed covered by this Agreement. These plans would address the protection, conservation and restoration of stream corridors, riparian forest buffers and wetlands for the purposes of improving habitat and water quality, with collateral benefits for optimizing stream flow and water supply.

- By 2001, each jurisdiction will develop guidelines to ensure the aquatic health of stream corridors. Guidelines should consider optimal surface and groundwater flows.

- By 2002, each jurisdiction will work with local governments and communities that have watershed management plans to select pilot projects that promote stream corridor protection and restoration.

- By 2003, include in the "State of the Bay Report," and make available to the public, local governments and others, information concerning the aquatic health of stream corridors based on adopted regional guidelines.

- By 2004, each jurisdiction, working with local governments, community groups and watershed organizations, will develop stream corridor restoration goals based on local watershed management planning.

Wetlands

- Achieve a no-net loss of existing wetlands acreage and function in the signatories' regulatory programs.

- By 2010, achieve a net resource gain by restoring 25,000 acres of tidal and non-tidal wetlands. To do this, we commit to achieve and maintain an average restoration rate of 2,500 acres per year basin wide by 2005 and beyond. We will evaluate our success in 2005.

- Provide information and assistance to local governments and community groups for the development and implementation of wetlands preservation plans as a component of a locally based integrated watershed management plan. Establish a goal of implementing the wetlands plan component in 25 percent of the land area of each state's Bay watershed by 2010. The plans would preserve key wetlands while addressing surrounding land use so as to preserve wetland functions.

- Evaluate the potential impact of climate change on the Chesapeake Bay watershed, particularly with respect to its wetlands, and consider potential management options.

Forests

- By 2002, ensure that measures are in place to meet our riparian forest buffer restoration goal of 2,010 miles by 2010. By 2003, establish a new goal to expand buffer mileage.

- Conserve existing forests along all streams and shorelines.

- Promote the expansion and connection of contiguous forests through conservation easements, green-ways, purchase and other land conservation mechanisms.

WATER QUALITY PROTECTION AND RESTORATION

Improving water quality is the most critical element in the overall protection and restoration of the Chesapeake Bay and its tributaries. In 1987, we committed to achieving a 40 percent reduction in controllable nutrient loads to the Bay. In 1992, we committed to tributary-specific reduction strategies to achieve this reduction and agreed to stay at or below these nutrient loads once attained. We have made measurable reductions in pollution loading despite continuing growth and development. Still, we must do more.

Recent actions taken under the Clean Water Act resulted in listing portions of the Chesapeake Bay and its tidal rivers as "impaired waters." These actions have emphasized the regulatory framework of the Act along with the ongoing cooperative efforts of the Chesapeake Bay Program as the means to address the nutrient enrichment problems within the Bay and its rivers. In response, we have developed, and are implementing, a process for integrating the cooperative and statutory programs of the Chesapeake Bay and its tributaries. We have agreed to the goal of improving water quality in the Bay and its tributaries so that these waters may be removed from the impaired waters list prior to the time when regulatory mechanisms under Section 303(d) of the Clean Water Act would be applied.

We commit to achieve and maintain water quality conditions necessary to support living resources throughout the Chesapeake Bay ecosystem. Where we have failed to achieve established water quality goals, we will take actions necessary to reach and maintain those goals. We will make pollution prevention a central theme in the protection of water quality. And we will take actions that protect freshwater flow regimes for riverine and estuarine habitats. In pursuing the restoration of

vital habitats throughout the watershed, we will continue efforts to improve water clarity in order to meet light requirements necessary to support SAY We will expand our efforts to reduce sediments and airborne pollution, and ensure that the Bay is free from toxic effects on living resources and human health. We will continue our cooperative intergovernmental approach to achieve and maintain water quality goals through cost-effective and equitable means within the framework of federal and state law. We will evaluate the potential impacts of emerging issues, including, among others, airborne ammonia and nonpoint sources of chemical contaminants. Finally, we will continue to monitor water quality conditions and adjust our strategies accordingly.

GOAL

Achieve and maintain the water quality necessary to support the aquatic living resources of the Bay and its tributaries and to protect human health.

Nutrients and Sediments

- Continue efforts to achieve and maintain the 40 percent nutrient reduction goal agreed to in 1987, as well as the goals being adopted for the tributaries south of the Potomac River.

- By 2010, correct the nutrient- and sediment-related problems in the Chesapeake Bay and its tidal tributaries sufficiently to remove the Bay and the tidal portions of its tributaries from the list of impaired waters under the Clean Water Act. In order to achieve this:

    1. By 2001, define the water quality conditions necessary to protect aquatic living resources and then assign load

reductions for nitrogen and phosphorus to each major tributary;

2. Using a process parallel to that established for nutrients, determine the sediment load reductions necessary to achieve the water quality conditions that protect aquatic living resources, and assign load reductions for sediment to each major tributary by 2001;

3. By 2002, complete a public process to develop and begin implementation of revised Tributary Strategies to achieve and maintain the assigned loading goals;

4. By 2003, the jurisdictions with tidal waters will use their best efforts to adopt new or revised water quality standards consistent with the defined water quality conditions. Once adopted by the jurisdictions, the Environmental Protection Agency will work expeditiously to review the new or revised standards, which will then be used as the basis for removing the Bay and its tidal rivers from the list of impaired waters; and

5. By 2003, work with the Susquehanna River Basin Commission and others to adopt and begin implementing strategies that prevent the loss of the sediment retention capabilities of the lower Susquehanna River dams.

Chemical Contaminants

- We commit to fulfilling the 1994 goal of a Chesapeake Bay free of toxics by reducing or eliminating the input of chemical contaminants

from all controllable sources to levels that result in no toxic or bioaccumulative impact on the living resources that inhabit the Bay or on human health.

- By Fall of 2000, reevaluate and revise, as necessary, the "Chesapeake Bay Basinwide Toxics Reduction and Prevention Strategy" focusing on:

  1. Complementing state and federal regulatory programs to go beyond traditional point source controls, including nonpoint sources such as groundwater discharge and atmospheric deposition, by using a watershed-based approach; and

  2. Understanding the effects and impacts of chemical contaminants to increase the effectiveness of management actions.

- Through continual improvement of pollution prevention measures and other voluntary means, strive for zero release of chemical contaminants from point sources, including air sources. Particular emphasis shall be placed on achieving, by 2010, elimination of mixing zones for persistent or bioaccumulative toxics.

- Reduce the potential risk of pesticides to the Bay by targeting education, outreach and implementation of Integrated Pest Management and specific Best Management Practices on those lands that have higher potential for contributing pesticide loads to the Bay.

Priority Urban Waters

- Support the restoration of the Anacostia River, Baltimore Harbor, and Elizabeth River and their

watersheds as models for urban river restoration in the Bay basin.

- By 2010, the District of Columbia, working with its watershed partners, will reduce pollution loads to the Anacostia River in order to eliminate public health concerns and achieve the living resource, water quality and habitat goals of this and past Agreements.

Air Pollution

- By 2003, assess the effects of airborne nitrogen compounds and chemical contaminants on the Bay ecosystem and help establish reduction goals for these contaminants.

Boat Discharge

- By 2003, establish appropriate areas within the Chesapeake Bay and its tributaries as "no discharge zones" for human waste from boats. By 2010, expand by 50 percent the number and availability of waste pump-out facilities.

- By 2006, reassess our progress in reducing the impact of boat waste on the Bay and its tributaries. This assessment will include evaluating the benefits of further expanding no discharge zones, as well as increasing the number of pump-out facilities.

SOUND LAND USE

In 1987, the signatories agreed that "there is a clear correlation between population growth and associated development and environmental degradation in the Chesapeake Bay system." This Agreement reaffirms that concept and recognizes that more must be done.

An additional three million people are expected to settle in the watershed by 2020. This growth could potentially eclipse the nutrient reduction and habitat protection gains of the past. Therefore it is critical that we consider our approaches to land use in order to ensure progress in protecting the Bay and its local watersheds.

Enhancing, or even maintaining, the quality of the Bay while accommodating growth will frequently involve difficult choices. It will require a renewed commitment to appropriate development standards. The signatories will assert the full measure of their authority to limit and mitigate the potential adverse effects of continued growth; each however, will pursue this objective within the framework of its own historic, existing or future land use practices or processes. Local jurisdictions have been delegated authority over many decisions regarding growth and development which have both direct and indirect effects on the Chesapeake Bay system and its living resources. The role of local governments in the Bay's restoration and protection effort will be given proper recognition and support through state and federal resources. States will also engage in active partnerships with local governments in managing growth and development in ways that support the following goal.

We acknowledge that future development will be sustainable only if we protect our natural and rural resource land, limit impervious surfaces and concentrate new growth in existing population centers or suitable areas served by appropriate infrastructure. We will work to integrate environmental, community and economic goals by promoting more environmentally sensitive forms of development. We will also strive to coordinate land-use, transportation, water and sewer and other infrastructure planning so that funding and policies at all levels of government do not contribute to poorly planned growth and development or degrade local water quality and habitat. We will advance these policies by creating

partnerships with local governments to protect our communities and to discharge our duties as trustees in the stewardship of the Chesapeake Bay. Finally, we will report every two years on our progress in achieving our commitments to promote sound land use.

GOAL

Develop, promote and achieve sound land use practices which protect and restore watershed resources and water quality, maintain reduced pollutant loadings for the Bay and its tributaries, and restore and preserve aquatic living resources.

Land Conservation

- By 2001, complete an assessment of the Bay's resource lands including forests and farms, emphasizing their role in the protection of water quality and critical habitats, as well as cultural and economic viability.

- Provide financial assistance or new revenue sources to expand the use of voluntary and market-based mechanisms such as easements, purchase or transfer of development rights and other approaches to protect and preserve natural resource lands.

- Strengthen programs for land acquisition and preservation within each state that are supported by funding and target the most valued lands for protection. Permanently preserve from development 20 percent of the land area in the watershed by 2010.

- Provide technical and financial assistance to local governments to plan for or revise plans, ordinances and subdivision regulations to provide

for the conservation and sustainable use of the forest and agricultural lands.

- In cooperation with local governments, develop and maintain in each jurisdiction a strong GIS system to track the preservation of resource lands and support the implementation of sound land use practices.

Development, Redevelopment and Revitalization

- By 2012, reduce the rate of harmful sprawl development of forest and agricultural land in the Chesapeake Bay watershed by 30 percent measured as an average over five years from the baseline of 1992-1997, with measures and progress reported regularly to the Chesapeake Executive Council.
- By 2005, in cooperation with local government, identify and remove state and local impediments to low impact development designs to encourage the use of such approaches and minimize water quality impacts.

- Work with communities and local governments to encourage sound land use planning and practices that address the impacts of growth, development and transportation on the watershed.

- By 2002, review tax policies to identify elements which discourage sustainable development practices or encourage undesirable growth patterns. Promote the modification of such policies and the creation of tax incentives which promote the conservation of resource lands and encourage investments consistent with sound growth management principles.

- The jurisdictions will promote redevelopment and remove barriers to investment in underutilized urban, suburban and rural communities by working with localities and development interests.

- By 2002, develop analytical tools that will allow local governments and communities to conduct watershed-based assessment of the impacts of growth, development and transportation decisions.

- By 2002, compile information and guidelines to assist local governments and communities to promote ecologically-based designs in order to limit impervious cover in undeveloped and moderately developed watersheds and reduce the impact of impervious cover in highly developed watersheds.

- Provide information to the development community and others so they may champion the application of sound land use practices.

- By 2003, work with local governments and communities to develop land-use management and water resource protection approaches that encourage the concentration of new residential development in areas supported by adequate water resources and infrastructure to minimize impacts on water quality.

- By 2004, the jurisdictions will evaluate local implementation of storm water, erosion control and other locally-implemented water quality protection programs that affect the Bay system and ensure that these programs are being coordinated and applied effectively in order to minimize the impacts of development.

- Working with local governments and others, develop and promote wastewater treatment options, such as nutrient reducing septic systems, which protect public health and minimize impacts to the Bay's resources.

- Strengthen brownfield redevelopment. By 2010, rehabilitate and restore 1,050 brownfield sites to productive use.

- Working with local governments, encourage the development and implementation of emerging urban storm water retrofit practices to improve their water quantity and quality function.

Transportation

- By 2002, the signatory jurisdictions will promote coordination of transportation and land use planning to encourage compact, mixed use development patterns, revitalization in existing communities and transportation strategies that minimize adverse effects on the Bay and its tributaries.

- By 2002, each state will coordinate its transportation policies and programs to reduce the dependence on automobiles by incorporating travel alternatives such as telework, pedestrian, bicycle and transit options, as appropriate, in the design of projects so as to increase the availability of alternative modes of travel as measured by increased use of those alternatives.

- Consider the provisions of the federal transportation statutes for opportunities to purchase easements to preserve resource lands adjacent to rights of way and special efforts for

stormwater management on both new and rehabilitation projects.

- Establish policies and incentives which encourage the use of clean vehicle and other transportation technologies that reduce emissions.

Public Access

- By 2010, expand by 30 percent the system of public access points to the Bay, its tributaries and related resource sites in an environmentally sensitive manner by working with state and federal agencies, local governments and stakeholder organizations.
- By 2005, increase the number of designated water trails in the Chesapeake Bay region by 500 miles.

- Enhance interpretation materials that promote stewardship at natural, recreational, historical and cultural public access points within the Chesapeake Bay watershed.

- By 2003, develop partnerships with at least 30 sites to enhance place-based interpretation of Bay-related resources and themes and stimulate volunteer involvement in resource restoration and conservation.

STEWARDSHIP AND COMMUNITY ENGAGEMENT

The Chesapeake Bay is dependent upon the actions of every citizen in the watershed, both today and in the future. We recognize that the cumulative benefit derived from community-based watershed programs is essential for continued progress toward a healthier Chesapeake Bay. Therefore, we commit ourselves to engage our citizens by promoting a broad conservation ethic throughout the fabric of community life, and foster

within all citizens a deeper understanding of their roles as trustees of their own local environments. Through their actions, each individual can contribute to the health and well-being of their neighborhood streams, rivers and the land that surrounds them, not only as ecological stewards of the Bay but also as members of watershed-wide communities. By focusing individuals on local resources, we will advance Baywide restoration as well.

We recognize that the future of the Bay also depends on the actions of generations to follow. Therefore, we commit to provide opportunities for cooperative learning and action so that communities can promote local environmental quality for the benefit and enjoyment of residents and visitors. We will assist communities throughout the watershed in improving quality of life, thereby strengthening local economies and connecting individuals to the Bay through their shared sense of responsibility. We will seek to increase the financial and human resources available to localities to meet the challenges of restoring the Chesapeake Bay.

GOAL

Promote individual stewardship and assist individuals, community-based organizations, businesses, local governments and schools to undertake initiatives to achieve the goals and commitments of this agreement.

Education and Outreach

- Make education and outreach a priority in order to achieve public awareness and personal involvement on behalf of the Bay and local watersheds.

- Provide information to enhance the ability of citizen and community groups to participate in

Bay restoration activities on their property and in their local watershed.

- Expand the use of new communications technologies to provide a comprehensive and interactive source of information on the Chesapeake Bay and its watershed for use by public and technical audiences. By 2001, develop and maintain a web-based clearing house of this information specifically for use by educators.

- Beginning with the class of 2005, provide a meaningful Bay or stream outdoor experience for every school student in the watershed before graduation from high school.

- Continue to forge partnerships with the Departments of Education and institutions of higher learning in each jurisdiction to integrate information about the Chesapeake Bay and its watershed into school curricula and university programs.

- Provide students and teachers alike with opportunities to directly participate in local restoration and protection projects, and to support stewardship efforts in schools and on school property.

- By 2002, expand citizen outreach efforts to more specifically include minority populations by, for example, highlighting cultural and historical ties to the Bay, and providing multi-cultural and multilingual educational materials on stewardship activities and Bay information.

Community Engagement

- Jurisdictions will work with local governments to identify small watersheds where community-based actions are essential to meeting Bay restoration goals—in particular wetlands, forested buffers, stream corridors and public access and work with local governments and community organizations to bring an appropriate range of Bay program resources to these communities.

- Enhance funding for locally-based programs that pursue restoration and protection projects that will assist in the achievement of the goals of this and past agreements.
- By 2001, develop and maintain a clearing house for information on local watershed restoration efforts, including financial and technical assistance.

- By 2002, each signatory jurisdiction will offer easily-accessible information suitable for analyzing environmental conditions at a small watershed scale.

- Strengthen the Chesapeake Bay Program's ability to incorporate local governments into the policy decision making process. By 2001, complete a revaluation of the Local Government Participation Action Plan and make necessary changes in Bay program and jurisdictional functions based upon the reevaluation.

- Improve methods of communication with and among local governments on Bay issues and provide adequate opportunities for discussion of key issues.

- By 2001, identify community watershed organizations and partnerships. Assist in establishing new organizations and partnerships where interest exists. These partners will be important to successful watershed management efforts in distributing information to the public, and engaging the public in the Bay restoration and preservation effort.

- By 2005, identify specific actions to address the challenges of communities where historically poor water quality and environmental conditions have contributed to disproportional health, economic or social impacts.

Government by Example

- By 2002, each signatory will put in place processes to:

  1. Ensure that all properties owned, managed or leased by the signatories are developed, redeveloped and used in a manner consistent with all relevant goals, commitments and guidance of this Agreement.

  2. Ensure that the design and construction of signatory-funded development and redevelopment projects are consistent with all relevant goals, commitments and guidance of this Agreement.

- Expand the use of clean vehicle technologies and fuels on the basis of emission reductions, so that a significantly greater percentage of each signatory government's fleet of vehicles use some form of clean technology.

- By 2001, develop an Executive Council Directive to address stormwater management to control nutrient, sediment and chemical contaminant runoff from state, federal and District owned land.

Partnerships

- Strengthen partnerships with Delaware, New York and West Virginia by promoting communication and by seeking agreements on issues of mutual concern.

- Work with non-signatory Bay states to establish links with community-based organizations through out the Bay watershed.

BY THIS AGREEMENT, we rededicate ourselves to the restoration and protection of the ecological integrity, productivity and beneficial uses of the Chesapeake Bay system. We reaffirm our commitment to previously-adopted Chesapeake Bay Agreements and their supporting policies. We agree to report annually to the citizens on the state of the Bay and consider any additional actions necessary.

DATE June 28, 2000

FOR THE COMMONWEALTH OF VIRGINIA /s/

FOR THE STATE OF MARYLAND /s/

FOR THE COMMONWEALTH OF PENNSYLVANIA /s/

FOR THE DISTRICT OF COLUMBIA /s/

FOR THE UNITED STATES
OF AMERICA _____ /s/

FOR THE CHESAPEAKE BAY
COMMISSION _____ /s/

Chesapeake Bay Program

1983 Chesapeake Bay Agreement

We recognize that the findings of the Chesapeake Bay Program have shown an historical decline in the living resources of the Chesapeake Bay and that a cooperative approach is needed among the Environmental Protection Agency (EPA), the State of Maryland, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia (the States) to fully address the extent, complexity, and sources of pollutants entering the Bay. We further recognize that EPA and the States share the responsibility for management decisions and resources regarding the high priority issues of the Chesapeake Bay.

Accordingly, the States and EPA agree to the following actions:

1. A Chesapeake Executive Council will be established which will meet at least twice yearly to assess and oversee the implementation of coordinated plans to improve and protect the water quality and living resources of the Chesapeake Bay estuarine systems. The Council will consist of the appropriate Cabinet designees of the Governors and the Mayor of the District of Columbia and the Regional Administrator of EPA. The Council will be initially chaired by EPA and will report annually to signatories of this Agreement

2. The Chesapeake Executive Council will establish an implementation committee of agency representatives who will meet as needed to coordinate technical matters and to coordinate the development and

evaluation of management plans. The Council may appoint such ex officio nonvoting members as deemed appropriate.

3. A liaison office for Chesapeake Bay activities will be established at EPA's Central Regional Laboratory in Annapolis, Maryland, to advise and support the Council and committee.

DATE: December 9, 1983

SIGNERS:

For the Commonwealth of Virginia	Charles S. Robb, Governor
For the State of Maryland	Harry Hughes, Governor
For the Commonwealth of Pennsylvania	Richard Thornburgh, Governor
For the District of Columbia	Marion Barry, Mayor
For the United States of America	William Ruckleshaus, Administrator, Environmental Protection Agency

1987 CHESAPEAKE BAY AGREEMENT

THE CHESAPEAKE BAY IS A NATIONAL TREASURE and a resource of worldwide significance. Its ecological, economic, and cultural importance are felt far beyond its waters and the communities that line its shores. Man's use and abuse of its bounty, however, together with the continued growth and development of population in its watershed, have taken a toll on the Bay system. In recent decades, the Bay has suffered serious declines in quality and productivity. ◊ *REPRESENTING* the Federal government and the States which surround the Chesapeake Bay, we acknowledge our stake in the resources of the Bay and accept our share of responsibility for its current condition. We are determined that this decline will be reversed. In response, all of our jurisdictions have embarked on ambitious programs to protect our shared resource and restore it to a more productive state. ◊ *IN* 1980, the legislatures of Virginia and Maryland established the Chesapeake Bay Commission to coordinate interstate planning and programs from a legislative perspective. In 1985, Pennsylvania joined the Commission. And, in 1983, Virginia, Maryland, Pennsylvania, the District of Columbia, the U.S. Environmental Protection Agency and the Chesapeake Bay Commission formally agreed to a cooperative approach to this undertaking and established specific mechanisms for its coordination. Since 1983, our joint commitment has carried us to new levels of governmental cooperation and scientific understanding. It has formed a firm base for the future success of this long-term program. The extent and complexity of our task now call for an expanded and refined agreement to guide our efforts toward the twenty-first century. ◊ *RECOGNIZING* that the Chesapeake Bay's importance transcends regional boundaries, we commit to managing the Chesapeake Bay as an integrated ecosystem and pledge our best efforts to achieve the goals in this Agreement. We propose a series of objectives that will

establish a policy and institutional framework for continued cooperative efforts to restore and protect Chesapeake Bay. We further commit to specific actions to achieve those objectives. The implementation of these commitments will be reviewed annually and additional commitments developed as needed.

GOALS AND PRIORITY COMMITMENTS

THIS NEW AGREEMENT CONTAINS Goals and Priority Commitments for Living Resources; Water Quality; Population Growth and Development; Public Information, Education and Participation; Public Access; and Governance. ◊ The parties to this 1987 Agreement are the U.S. Environmental Protection Agency representing the Federal government, the District of Columbia, the State of Maryland and the Commonwealths of Pennsylvania and Virginia (hereinafter the "States") and the Chesapeake Bay Commission. This Agreement may be amended and attachments added in the future by unanimous action of the Chesapeake Executive Council.

LIVING RESOURCES

GOAL: *PROVIDE FOR THE RESTORATION AND PROTECTION OF THE LIVING RESOURCES, THEIR HABITATS AND ECOLOGICAL RELATIONSHIPS.* The productivity, diversity and abundance of living resources are the best ultimate measures of the Chesapeake Bay's condition. These living resources are the main focus of the restoration and protection effort. Some species of shellfish and finfish are of immense commercial and recreational value to man. Others are valuable because they are part of the vast array of plant and animal life that make up the Chesapeake Bay ecosystem on which all species depend. We recognize that the entire natural system must be healthy and productive. We will determine the essential elements of habitat and environmental quality

necessary to support living resources and will see that these conditions are attained and maintained. We will also manage the harvest of and monitor populations of commercially, recreationally and ecologically valuable species to ensure sustained, viable stocks. We recognize that to be successful, these actions must be carried out in an integrated and coordinated manner across the whole Bay system.

OBJECTIVES:

- ◊ Restore, enhance, protect and manage submerged aquatic vegetation.

- ◊ Protect, enhance and restore wetlands, coastal sand dunes, forest buffers and other shoreline and riverline systems important to water quality and habitat.

- ◊ Conserve soil resources and reduce erosion and sedimentation to protect Bay habitat.

- ◊ Maintain freshwater flow regimes necessary to sustain estuarine habitats, including, where appropriate, establishing minimum in-stream flows.

- ◊ Develop compatible Bay-wide stock assessment programs.

- ◊ Develop Bay-wide fisheries management strategies and develop complementary state programs and plans to protect and restore the finfish and shellfish stocks of the Bay, especially the freshwater and estuarine spawners.

- ◊ Provide for the restoration of shellfish stocks in the Bay, especially the abundance of commercially important species.

◊ Restore, enhance and protect waterfowl and wildlife.

COMMITMENT:

TO ACHIEVE THIS GOAL WE AGREE:

◊ by *January 1988,* to develop and adopt guidelines for the protection of water quality and habitat conditions necessary to support the living resources found in the Chesapeake Bay system, and to use these guidelines in the implementation of water quality and habitat protection programs.

◊ by *July 1988,* to develop, adopt and begin to implement a Bay-wide plan for the assessment of commercially, recreationally and selected ecologically valuable species.

◊ by *July 1988,* to adopt a schedule for the development of Bay-wide resource management strategies for commercially, recreationally and selected ecologically valuable species.

◊ by *July 1989,* to develop, adopt and begin to implement Bay-wide management plans for oysters, blue crabs and American Shad. Plans for other major commercially, recreationally and ecologically valuable species should be initiated by 1990.

◊ by *December 1988,* to develop a Bay-wide policy for the protection of tidal and non-tidal wetlands.

◊ Provide for fish passage at dams, and remove stream blockages wherever necessary to restore natural passage for migratory fish.

WATER QUALITY

GOAL: *REDUCE AND CONTROL POINT AND NON-POINT SOURCES OF POLLUTION TO ATTAIN THE WATER QUALITY CONDITION NECESSARY TO SUPPORT THE LIVING RESOURCES OF THE BAY.* The improvement and maintenance of water quality are the single most critical elements in the over-all restoration and protection of the Chesapeake Bay. Water is the medium in which all living resources of the bay live, and their ability to survive and flourish is directly dependent on it. ◊ To ensure the productivity of the living resources of the Bay, we must clearly establish the water quality conditions they require and must then attain and maintain those conditions. Foremost, we must improve or maintain dissolved oxygen concentrations in the Bay and its tributaries through a continued and expanded commitment to the reduction of nutrients from both point and nonpoint sources. We must do the same for toxics and conventional pollutants. To be effective, we will develop basin-wide implementation plans for the control and reduction of pollutants which are based on our best understanding (including that derived from modeling) of the Bay and its tributaries as an integrated system.

OBJECTIVES:

◊ Provide timely construction and maintenance of public and private sewerage facilities to assure control of pollutant discharges.

◊ Reduce the discharge of untreated or inadequately treated sewage into Bay waters from such sources as combined sewer overflows, leaking sewage systems, and failing septic systems.

◊ Evaluate and institute, where appropriate, alternative technologies for point source pollution control, such as biological nutrient removal and

land application of effluent to reduce pollution loads in a cost-effective manner.

◊ Establish and enforce pollutant limitations to ensure compliance with water quality laws.

◊ Reduce the levels of nonpoint sources of pollution.

◊ Reduce sedimentation by strengthening enforcement of existing control regulations.

◊ Eliminate pollutant discharges from recreational boats.

◊ Identify and control toxic discharges to the Bay system, including metals and toxic organics, to protect water quality, aquatic resources and human health through implementation and enforcement of the states' National Pollutant Discharge Elimination System permit programs and other programs.

◊ Reduce chlorine discharges in critical finfish and shellfish areas. Minimize water pollution incidents and provide adequate response to pollutant spills.

◊ Manage sewage sludge, dredged spoil and hazardous wastes to protect the Bay system.

◊ Manage groundwater to protect the water quality of the Bay.

◊ Quantify the impacts and identify the sources of atmospheric inputs on the Bay system.

COMMITMENT:

TO ACHIEVE THIS GOAL WE AGREE:

◊ by *July 1988,* to develop, adopt and begin implementation of a basin-wide strategy to equitably achieve by the year 2000 at least a 40 percent reduction of nitrogen and phosphorus entering the main stem of the Chesapeake Bay. The strategy should be based on agreed upon 1985 point source loads and on nonpoint loads in an average rainfall year.

◊ by *December 1991,* to re-evaluate the 40 percent reduction target based on the results of modeling, research, monitoring and other information available at that time.

◊ by *December 1988,* to develop, adopt and begin implementation of a basin-wide strategy to achieve a reduction of toxics consistent with the Water Quality Act of 1987 which will ensure protection of human health and living resources. The strategy will cover both point and nonpoint sources, monitoring protocols, enforcement of pretreatment regulations and methods for dealing with in-place toxic sediments where necessary.

◊ by *July 1988,* to develop and adopt, as required by the Water Quality Act of 1987, a basin-wide implementation strategy for the management and control of conventional pollutants entering the Chesapeake Bay system from point and nonpoint sources.

◊ by *July 1988,* the Environmental Protection Agency, acting for the federal government, will develop, adopt and begin implementation of a strategy for the control and reduction of point and

nonpoint sources of nutrient, toxic and conventional pollution from all federal facilities.

POPULATION GROWTH AND DEVELOPMENT

GOAL: *PLAN FOR AND MANAGE THE ADVERSE ENVIRONMENTAL EFFECTS OF HUMAN POPULATION GROWTH AND LAND DEVELOPMENT IN THE CHESAPEAKE BAY WATERSHED.* There is a clear correlation between population growth and associated development and environmental degradation in the Chesapeake Bay system. Enhancing, or even maintaining, the quality of the Bay while accommodating growth will fre-quently involve difficult decisions and restrictions and will require continued and enhanced commitment to proper development standards. The states and the federal government will assert the full measure of their authority to mitigate the potential adverse effects of continued growth. ◊ Local jurisdictions have been delegated authority over many decisions regarding growth and development which have both direct and indirect effects on the Chesapeake Bay system and its living resources. The role of local governments in the restoration and protection effort will be given proper recognition and support through state and federal resources. ◊ States will engage in an active partnership with local governments to establish policy guidelines to manage growth and development.

OBJECTIVES:

◊ Designate a state-level office responsible for ensuring consistency with this Agreement among the agencies responsible for comprehensive oversight of development activity, including infrastructure planning, capital budgets, land preservation and waste management activities.

◊ Provide local governments with financial and technical assistance to continue and expand their management efforts.

◊ Consult with local government representatives in the development of Chesapeake Bay restoration and protection plans and programs.

◊ Identify and give public recognition to innovative and otherwise noteworthy examples of local government restoration and protection-related programs.

◊ Assure that government development projects meet all environmental requirements.

◊ Promote, among local, state and federal governments, and the private sector, the use of innovative techniques to avoid and, where necessary, mitigate the adverse impacts of growth.

COMMITMENT:

TO ACHIEVE THIS GOAL WE AGREE:

◊ To commission a panel of experts to report, by *December 1988,* on anticipated population growth and land development patterns in the Bay region through the year 2020, the infrastructure requirements necessary to serve growth and development, environmental programs needed to improve Bay resources while accommodating growth, alternative means of managing and directing growth and alternative mechanisms for financing governmental services and environmental controls. The panel of experts will consist of twelve members: three each from Virginia, Maryland and Pennsylvania, and one each from the District of Columbia, Environmental

Protection Agency and the Chesapeake Bay Commission.

◊ by *January 1989*, to adopt development policies and guidelines designed to reduce adverse impacts on the water quality and living resources of the Bay, including minimum best management practices for development and to cooperatively assist local governments in evaluating land-use and development decisions within their purview, consistent with the policies and guidelines.

◊ to evaluate state and federal development projects in light of their potential impacts on the water quality and living resources of the Chesapeake Bay, and design and carry out each state and federal development project so as to serve as a model for the private sector in terms of land-use practices.

◊ by *December 1988*, to develop a strategy to provide incentives, technical assistance and guidance to local governments to actively encourage them to incorporate protection of tidal and non-tidal wetlands and fragile natural areas in their land-use planning, water and sewer planning, construction and other growth-related management processes.

GOAL: *PROMOTE GREATER UNDERSTANDING AMONG CITIZENS ABOUT THE CHESAPEAKE BAY SYSTEM, THE PROBLEMS FACING IT AND POLICIES AND PROGRAMS DESIGNED TO HELP IT, AND TO FOSTER INDIVIDUAL RESPONSIBILITY AND STEWARDSHIP OF THE BAY'S RESOURCES.*

GOAL: *PROVIDE INCREASED OPPORTUNITIES FOR CITIZENS TO PARTICIPATE IN DECISIONS AND PROGRAMS AFFECTING THE BAY.* The understanding and support of the general public and interest groups are

essential to sustaining the long-term commitment to the restoration and protection of the Chesapeake Bay system and its living resources. Citizens must have opportunities to learn about that system and associated management policies and programs and must be given opportunities to contribute ideas about how best to manage that natural system.

OBJECTIVES:

- ◊ Provide timely information on the progress of the restoration program.

- ◊ Assure a continuing process of public input and participation in policy decisions affecting the Bay.

- ◊ Enhance Bay-oriented education opportunities to increase public awareness and understanding of the Bay system.

- ◊ Provide curricula and field experiences for students.

- ◊ Promote opportunities to involve citizens directly in Bay restoration efforts.

- ◊ Coordinate the production and distribution of Bay information and education materials.

COMMITMENT:

TO ACHIEVE THESE COALS WE AGREE:

- ◊ to conduct coordinated education and information programs to inform the general public, local governments, business, students, community associations and others of their roles, responsibilities and opportunities in the restoration and protection effort, and to promote

public involvement in the management and decision-making process.

◊ to provide for public review and comment on all implementation plans developed pursuant to this agreement.

◊ by *March 1988,* to develop state and federal communication plans for public information, education and participation, and by *May 1988,* to develop a unified, Bay-wide communication plan.

◊ to promote Chesapeake Bay restoration efforts by establishing an annual Bay-wide series of Chesapeake Bay Watershed Awareness events, to include a Governor's Cup Fishing Tournament.

PUBLIC ACCESS

GOAL: *PROMOTE INCREASED OPPORTUNITIES FOR PUBLIC APPRECIATION AND ENJOYMENT OF THE BAY AND ITS TRIBUTARIES.* Interest in and commitment to the Chesapeake Bay and its tributaries are greatly affected by personal contact with that natural system. Consequently, improved opportunities for access to the shores and waters of the system are essential if public awareness and support are to be maintained and increased.

OBJECTIVES:

◊ Improve and maintain access to the Bay including public beaches, parks and forested lands.

◊ Improve opportunities for recreational and commercial fishing.

◊ Secure shoreline acreage to maintain open space and provide opportunities for passive recreation.

◊ Secure necessary acreage to protect unique habitat and environmentally sensitive areas.

COMMITMENT:

TO ACHIEVE THIS GOAL WE AGREE:

◊ to intensify our efforts to improve and expand public access opportunities being made available by the federal government, the states, and local governments, by developing a strategy, which includes an inventory of current access opportunities by *July 1988*, which targets state and federal actions to secure additional tidal shorefront acres by *December 1990* along the Bay and its tributaries.

◊ by *December 1988*, to prepare a comprehensive guide to access facilities and the natural resource system for the tidal Chesapeake Bay.

GOVERNANCE

GOAL: *SUPPORT AND ENHANCE THE PRESENT COMPREHENSIVE, COOPERATIVE AND COORDINATED APPROACH TOWARD MANAGEMENT OF THE CHESAPEAKE BAY SYSTEM.*

GOAL: *PROVIDE FOR CONTINUITY OF MANAGEMENT EFFORTS AND PERPETUATION OF COMMITMENTS NECESSARY TO ENSURE LONG-TERM RESULTS.* The cooperation necessary to sustain an effective Chesapeake Bay restoration and protection effort requires a formal working arrangement involving the states and the federal government. That institutional arrangement must allow for and promote voluntary individual actions coordinated within a well-defined context of the individual responsibilities and authorities of each state and the federal government. It must also

ensure that actions which require a concerted, Bay-wide approach be addressed in common and without duplication. One of the principal functions of the coordinating institution is to develop strategic plans and oversee their implementation, based on advice from the public, from the scientific community and from user groups. ◊ In addition, the coordinating body must exert leadership to marshal public support, and it must be accountable for progress made under the terms of this agreement. The coordinating body will continue to be called the Chesapeake Executive Council. The Chesapeake Executive Council shall be comprised of the Governors, the Mayor of the District of Columbia, the Administrator of the Environmental Protection Agency and the Chairman of the Chesapeake Bay Commission. The chairmanship of the Council shall rotate annually as determined by the Council. The term of the Chairman shall be one year. The Administrator of the Environmental Protection Agency shall represent the federal government and the Chairman of the Chesapeake Bay Commission shall represent its members.

OBJECTIVES:

◊ Continue to demonstrate strong, regional leadership by convening an annual public meeting of the Chesapeake Executive Council.

◊ Continue to support the Chesapeake Executive Council and provide for technical and public policy advice by maintaining strong advisory committees.

◊ Coordinate Bay management activities and develop and maintain effective mechanisms for accountability.

◊ The Chesapeake Bay Liaison Office shall provide staff support to the Chesapeake Executive Council by providing analyses and data management, and by generating reports related to the overall

program. The Implementation Committee shall provide guidance to the CBLO Director in all matters relating to support for the Council and their supporting committees, subcommittees and work groups including the development of all plans and other documents associated with the Council.

◊ Examine the feasibility of joint funding support of the Chesapeake Bay Liaison Office.

◊ Track and evaluate activities which may affect estuarine water quality and resources and report at least annually.

◊ Develop and maintain a coordinated Chesapeake Bay data management system.

◊ Continue to implement a coordinated Bay-wide monitoring system and to develop a Bay-wide living resources monitoring system.

◊ Develop and implement a coordinated Bay-wide research program.

COMMITMENT:

TO ACHIEVE THESE GOALS WE AGREE:

◊ to develop an annual Chesapeake Bay work plan endorsed by the Chesapeake Executive Council.

◊ to continue to support Bay-wide environmental monitoring and research to provide the technical and scientific information necessary to support management decisions.

◊ to strengthen the Chesapeake Bay Liaison Office by assigning, as appropriate, staff persons from

each jurisdiction and from participating federal agencies to assist with the technical support functions of that office.

◊ by *July 1988,* to develop and adopt a comprehensive research plan to be evaluated and updated annually to address the technical needs of the Chesapeake Bay Program.

◊ by *July 1988,* develop a Bay-wide monitoring plan for selected commercially, recreationally and ecologically valuable species.

◊ by *March 1988,* to establish a local government advisory committee to the Chesapeake Executive Council and charge that committee to develop a strategy for local government participation in the Bay program.

◊ to consider and review the feasibility of establishing an independent Chesapeake Bay Executive Board.

◊ by *July 1988,* the Environmental Protection Agency, acting for the federal government, will develop, a coordinated, federal agency workplan which identifies specific federal programs to be integrated into a coordinated federal effort to support the restoration of the Chesapeake Bay.

By *THIS AGREEMENT,* we reaffirm our commitment to restore and protect the ecological integrity, productivity and beneficial uses of the Chesapeake Bay system. We agree to report in *January 1989* on progress made in fulfilling the commitments in this agreement, and to consider at that time additional commitments. The implementation strategies which will be developed pursuant to this agreement will be appended as annexes.

and annual reports will include an accounting of progress made on each strategy.

December 15, 1987
(Date)

FOR THE COMMONWEALTH OF VIRGINIA /s/

FOR THE STATE OF MARYLAND /s/

FOR THE COMMONWEALTH OF PENNSYLVANIA /s/

FOR THE UNITED STATES OF AMERICA /s/

FOR THE DISTRICT OF COLUMBIA /s/

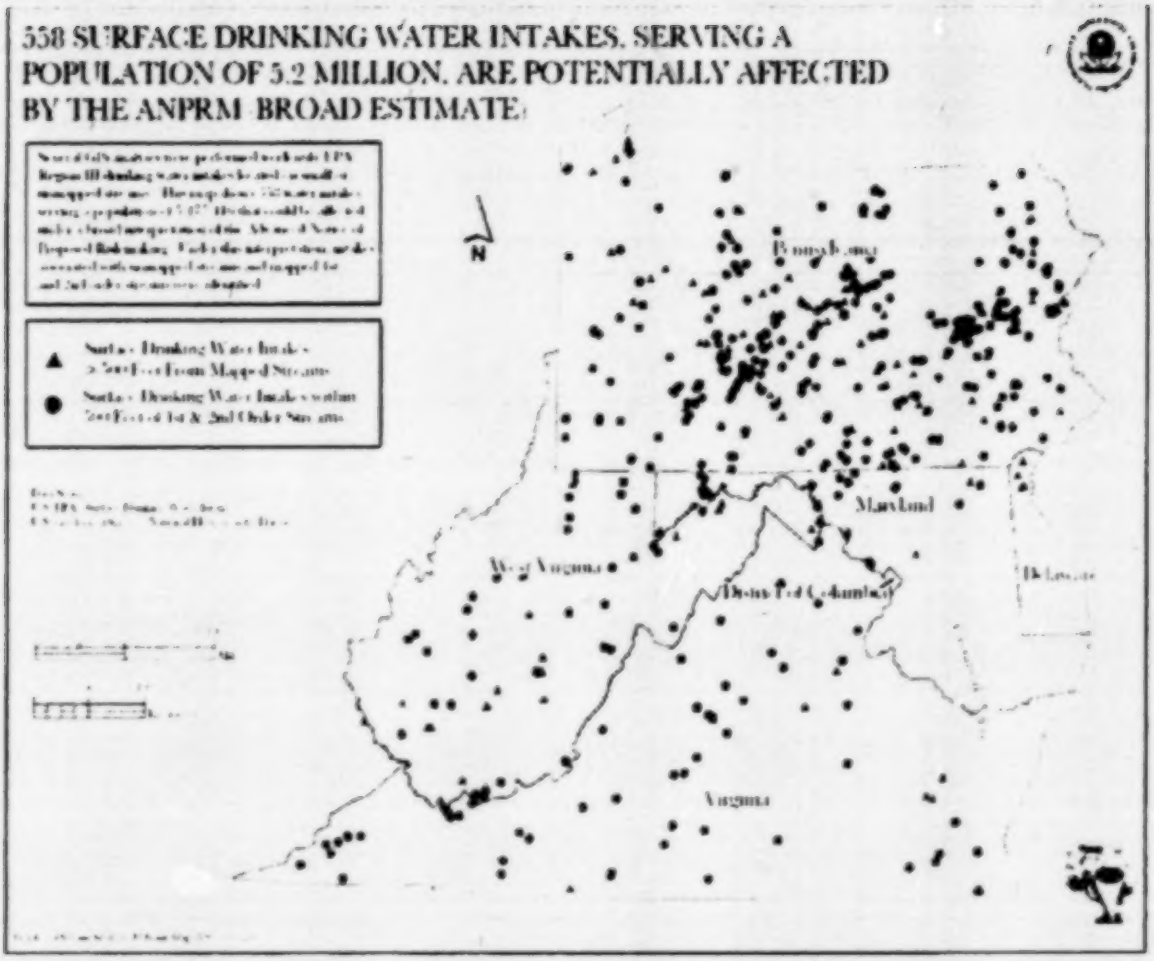
FOR THE CHESAPEAKE BAY COMMISSION /s/

BEST AVAILABLE COPY

Map produced by the U S Fish and Wildlife Service and the USDA Soil Conservation Service

A typical perennial headwater stream in summer

Photo by Maryland Department of the Environment
http://www.mde.state.md.us/Programs/WaterPrograms/Wetlands_Waterways/about_wetlands/photos.asp



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MEMORANDUM OF UNDERSTANDING

AMONG

the State of Delaware,
the District of Columbia,
the State of Maryland,
the State of New York,
the Commonwealth of Pennsylvania,
the Commonwealth of Virginia,
the State of West Virginia,
and the United States
Environmental Protection Agency

REGARDING

Cooperative Efforts for the Protection of the Chesapeake Bay and Its Rivers

WHEREAS, the Chesapeake Bay is a National Treasure for which we are responsible, due to our stewardship of the 64,000 square miles of land in its watershed, and the 111,000 miles of creeks, streams and rivers which run through our jurisdictions and ultimately into its waters; and,

WHEREAS, over the years the Chesapeake Bay's remarkable ecosystem has been impaired by the excess of nutrients and sediments flowing into it through its tributaries; and,

WHEREAS, the Chesapeake Bay Program, an internationally-recognized intergovernmental effort has made measurable strides toward the restoration of the Bay and its living resources; and

WHEREAS, that effort has been notable for its reliance on cooperative and consensus-based approaches for its greatest successes; and

WHEREAS, despite efforts to date, the tidal rivers and the Bay remain on the Clean Water Act list of impaired waters thereby requiring establishment of a total maximum daily load by May 2011 unless those waters meet applicable water quality standards by 2010; and

WHEREAS, we have developed a process, based on advanced science and data acquisition, which integrates the cooperative and statutory water quality programs applicable to the Chesapeake Bay and its tidal tributaries, and enhances through watershed-wide partnership the ability to restore the Bay's living resources and meet the necessary water quality standards;

NOW, THEREFORE, we, the undersigned executives representing the District, state and Federal entities with responsibility for the quality of the waters flowing into the Chesapeake Bay agree that we will:

- Work cooperatively to achieve the nutrient and sediment reduction targets that we agree are necessary to achieve the goals of a clean Chesapeake Bay by 2010, thereby allowing the Chesapeake and its tidal tributaries to be removed from the list of impaired waters.

- Provide for an inclusive, open and comprehensive public participation process.

- Collaborate on the development and use of innovative measures such as effluent trading, cooperative implementation mechanisms, and expanded interstate agreements to achieve the necessary reductions.

By this Agreement, we will work toward our goals in a spirit open to others, welcome new ideas, pursue fairness and equity, seek the most cost effective solutions, encourage collaborative approaches, and always be committed to the common goal of a healthy and productive Chesapeake Bay and its rivers. We agree to report annually to the citizens on the progress toward achieving the goals of this agreement.

FOR THE STATE OF DELAWARE /s/

FOR THE DISTRICT OF COLUMBIA /s/

FOR THE STATE OF MARYLAND /s/

FOR THE STATE OF NEW YORK /s/

FOR THE COMMONWEALTH OF PENNSYLVANIA /s/

FOR THE COMMONWEALTH OF VIRGINIA /s/

FOR THE STATE OF WEST VIRGINIA /s/

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY /s/

FILED
DEC 2 - 2005

Nos. 04-1034, 04-1384

In The

Supreme Court of the United States

RAPANOS, *et al.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

CARABELL, *et al.*, *Petitioners*,

v.

U. S. Army Corps of Engineers, *et al.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

Edwin Meese III
214 Massachusetts Ave. N.E
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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Nos. 04-1034, 04-1384

In The

Supreme Court of the United States

RAPANOS, *et al.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

CARABELL, *et al.*, *Petitioners*,

v.

U. S. Army Corps of Engineers, *et al.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that We the People delegated to the national government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including John C. Eastman, "*A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*," 2004 CATO SUPREME COURT REVIEW 469 (2004), and a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS.

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Kelo* v. *City of New London, Connecticut*, 125 S.Ct. 2655 (2005); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). It seeks to elaborate on the arguments that have been made by Petitioners regarding the scope of the power delegated to Congress under the Commerce Clause. The Claremont Institute believes that its scholarly

expertise about the theoretical and historical origins of the American constitutional system of government will aid this Court in evaluating whether the assertion of jurisdiction made by the Army Corps of Engineers over wetlands with only a tenuous hydrological connection to any navigable water of the United States exceeds Congress's authority to regulate commerce among the states.

SUMMARY OF ARGUMENT

Over the past decade and a half, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Morrison*, 529 U.S. 598, 616

n.7 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995). And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In interpreting the federal Clean Water Act to cover wetlands which have, at best, only a tenuous connection to the navigable waters of the United States, for clearly police power rather than commerce power purposes, the United States Army Corps of Engineers has taken the statute well beyond the constitutional bounds of the Commerce Clause. U.S. CONST. ART. I, § 8, cl. 3. The Corps' effort to regulate isolated wetlands is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the Commerce Clause as broadly as the Corps does here is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially preempting land use decisions of all 50 states and their thousands of municipal subdivisions, the Corps has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look relatively minor.

ARGUMENT

I. By Interpreting the Clean Water Act to Cover Isolated Wetlands, the Corps Has Ignored the Principle of Enumerated Powers, a Principle Which the Founders Believed to Be Essential to Liberty.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See, e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Hamilton) (C. Rossiter, ed., 1961) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S., at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting THE FEDERALIST NO. 42, p. 267 (Madison) (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See, e.g., Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who

wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see, e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 J. WILSON, THE WORKS OF JAMES WILSON 770 (R. McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of sovereign powers was

highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See, e.g.*, THE FEDERALIST NO. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed

Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory*, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); U.S. CONST. ART. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *Lopez*, 514 U.S., at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458); *see also Morrison*, 120 S. Ct., at 1753 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power"

(citing *Arizona* v. *Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Gregory*, 501 U.S., at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S., at 572 (Powell, J., dissenting))); *Garcia*, 469 U.S., at 582 (O'Connor, J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 582 (quoting *Gregory*, 501 U.S., at 458); *Gregory*, 501 U.S., at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S., at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id.*, at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.*, THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers,

but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—the granting of land use permits and the regulation of wholly intrastate "wetlands"—are within the core of the police powers reserved to the states or to the people.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 20-21, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.), at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936)

(Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts, as interpreted by the Corps of Engineers, to link the vintage exercise of the state police powers at issue here to its power to regulate interstate commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the interpretation of the Clean Water Act propounded by the Corps of Engineers is not the law of the land.

II. The Expansive Application of the Clean Water Act to Isolated Wetlands Is Neither a Regulation of Commerce Nor a Necessary and Proper Means of Giving Effect to a Regulation of Commerce.

As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade. *See, e.g., Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S., at 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons*, 22 U.S. (9 Wheat.), at 190; *see also Corfield*, 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include

all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate wholly intrastate waterways, therefore, would have been completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power to make land use regulations governing what a man could do on his own property, merely because his property abutted a ditch that connected to a creek, which in turn connected to a river that at some point became navigable—shared "a hydrological connection" that put them into a "symbiotic relationship" is the way the Sixth Circuit described it below, *United States* v. *Rapanos*, 376 F.3d 629, 640 (CA6 2004)—would have been beyond the pale. Add to that tenuous connection the true purpose of the Clean Water Act, which is to protect aquatic ecosystems rather than interstate commerce, and the claim of power asserted here by the Corps would have been quite incomprehensible to those who drafted and ratified the *Commerce* Clause.

This originally narrow understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *E.C. Knight*, 156 U.S., at 12, because "Commerce succeeds to manufacture, and is not a part of it." "The

fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as local land use), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation

> between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .

156 U.S., at 13; *see also Carter Coal*, 298 U.S., at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S., at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id.*, at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress;

> and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id.*, at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the interpretation of the Clean Water Act at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution, and neither court below even addresses, much less persuasively demonstrates, any commerce clause authority for the regulation at issue here. Rapanos and Carabell each sought to make improvements on their own land, not engage in interstate commerce. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, each of the petitioners had standing water on their land, and that standing water may have soaked into the land enough to qualify the land as "wetland." It is even possible that some of the moisture on their land might eventually find its way, through ditch and dell, to navigable waters of the State of Michigan, and those navigable waters might themselves ultimately be connected to navigable waters of the United States. But to contend, as the government did below in the two cases at issue here and in the previous crimi-

nal matter involving the *Rapanos* petitioners, that the Clean Water Act's definition of "navigable waters," expansively interpreted by regulation to include "wetlands adjacent to traditional navigable waters," 33 C.F.R. § 328.3(a)(7), can constitutionally be expanded even further to permit federal regulation of this land—nearly twenty miles from the nearest navigable stream in the Rapanos' case, *United States* v. *Rapanos*, 339 F.3d 447 (CA6 2003)—is to render meaningless any notion of limits on federal power.

Nor does the Necessary and Proper Clause provide a valid ground for the Corps of Engineers expansive assertion of power here. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.), at 324 (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4 Wheat.), at 423.[2] Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power.

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[2] Indeed, the whole Clean Water Act, and not just the expanded interpretation propounded by the Corps of Engineers that is at issue here, is arguably unconstitutional pretext. Ensuring the navigability of the nation's waters would be a Commerce Clause purpose, but that is not what the Clean Water Act purports to do. *See infra*, at 20-21.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case. Indeed, it is hard to imagine regulations more removed from the Commerce Clause power, as originally understood, than the interpretations of the Clean Water Act put forward by the Corps of Engineers here and its analogous "migratory bird" rule already invalidated by this Court in *SWANCC*.

III. Even under the expanded view of the Commerce Clause taken in this Court's modern-era precedents, the Corps' expansive claims of jurisdiction exceed the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress. Thus, in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison*, 529 U.S., at 616 n.6).

These reservations were key to this Court's decisions in *Lopez*, *Morrison*, and played a prominent role in *SWANCC* as well. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at

608; *SWANCC*, 531 U.S., at 173-74. As in those cases, the interpretation of the Clean Water Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Try as they might, the *Rapanos* and *Carabell* petitioners cannot transport any goods from their land to market via a waterway that begins in the moist soil of their own land (even assuming that the moisture itself can make its way to a navigable stream—a factually disputed point).

Nor does there appear to be any substantial effect on interstate commerce, and the courts below do not bother to identify one, or even to address this component of the *Lopez* analysis. Instead, the Court of Appeals based its decisions on the Corps' contorted statutory claim that the addition of fill dirt to Petitioners' own properties fell under the Corps' jurisdiction because the moist soil on the property might cross a berm and move into a ditch, which "connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system." *Carabell* v. *U.S. Army Corps of Engineers*, 391 F.3d 704, 705 (CA6 2004). Merely to state the supposed connection is to refute it, yet this broad interpretation of the Clean Water Act is entitled to *Chevron* deference, we are told in *Rapanos*, because the Corps' interpretation is "neither 'arbitrary, unreasonable, or manifestly contrary to the statute.'" *Rapanos*, 376 F.3d, at 641 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Although the *Rapanos* court mentioned this Court's holding in *SWANCC* that *Chevron* deference does not apply "where an otherwise acceptable construction of a statute would raise serious constitutional problems," it nevertheless refused to follow that holding, noting instead that this Court had applied *Chevron* deference in the pre-*SWANCC* (and pre-*Lopez*) case of *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *Riverside Bayview* dealt

with lands directly adjacent to a navigable lake, of course, so the potential connection with interstate commerce was at least arguable. 474 U.S., at 124. Even assuming *Chevron* deference remains appropriate in those circumstances, the *SWANCC* rule must be applied when, as here, the constitutionality of the interpretation is much more tenuous. Adjacent to a ditch, that leads to a creek, that leads to a river, that ultimately has a hydrological connection with navigable water, is a far cry from directly adjacent to a navigable lake, particularly in light of the supposed Commerce Clause authority for the regulation.

But again, the lower courts do not even address, much less demonstrate, that the Corps' interpretation fits within even the far outer limits of Commerce Clause authority. The addition of fill dirt to Petitioners' respective properties *might* alter the ecology of the area, which in turn would—what?—neither the lower courts nor the government even bothered to articulate a Commerce Clause purpose furthered by the Corps of Engineers' expansive jurisdictional claims.

At least in *SWANCC*, the government made an effort to tie its regulatory claims to an interstate financial impact by arguing that a decline in the migratory bird populations might result in fewer people traveling across state lines to hunt, trap and observe the migratory birds, which would in turn cause a decline in expenditures made by such traveling bird hunters and bird watchers, which would amount to a substantial effect on interstate commerce. *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). This Court quite sensibly questioned those claims in *SWANCC* as raising "significant constitutional questions." 531 U.S., at 173. We could go farther, and recognize them for what they truly were—a merely pretextual use of a commerce clause hook to attempt to validate an unconstitutional assertion of a police power. *See Lopez*, 514 U.S., at 567. Yet the government's

contentions in support of federal power here are even weaker than they were in *SWANCC*, and the government offers precious little to rationalize its power grab on Commerce Clause grounds, even pretextually. Rather, having lost the pretextual argument in *SWANCC*, the government seems bent on making a frontal assault on the very notion of limited, enumerated powers, boldly asserting a police power ground to support its claim of power. If it is successful, it would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"—the very concern that motivated this Court to strike down the Violence Against Women Act in *Morrison*, 529 U.S., at 615.

In short, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the interpretation of the Clean Water Act proffered by the Corps of Engineers remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The statute enacted by Congress does not actually pretend otherwise. Its express purpose is not to insure the navigability of the nation's waterways—a proper commerce clause purpose—but is rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—a clear police power purpose. *See* 33 U.S.C. § 1251(a).

If the statute merely prohibited the discharge into navigable waters of dredged or filled material, or other pollutants that could reasonably threaten navigability, the law would arguably be both a necessary and a proper means to further Congress's powers under the Commerce Clause, because such discharges could at some point threaten navigation.[3]

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[3] This is true even under the statutory definition of "navigable waters" as "the waters of the United States, including the territorial seas." 33

But the statute prohibits the discharge of "any pollutant," not just dredged or filled material or other pollutants that would threaten navigability. 33 U.S.C. § 1311. There is therefore not the jurisdictional element that this Court described as important in *Lopez*. 514 U.S., at 560. Moreover, under the Corps' interpretation, the statute prohibits the discharge of fill even in intrastate "mudflats, sandflats, wetlands, sloughs, prairie potholes," etc.—waters having no connection what-

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U.S.C. § 1362(7). "The waters of the United States" is both broader and more narrow than "navigable waters," from a commerce clause perspective. The phrase is narrower because the clause "of the United States" has historically excluded waters that are wholly within a single state, whether navigable or not. *See, e.g., Miller* v. *City of New York*, 109 U.S. 385, 395-96 (1883) ("by 'navigable waters of the United States' are meant such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states" (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)); *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876) (describing the navigable waters of the United States as those "which are accessible from a State other than those in which they lie"); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941) (same). The phrase is broader because "waters" would seem to include non-navigable waters, which could be reached by Congress under the Necessary and Proper Clause (rather than the Commerce Clause directly), *only if* regulation of such waters was both necessary and proper to further Congress's Commerce Clause powers. Hence, this Court's holding in *Riverside Bayview Homes, Inc.*, 474 U.S., at 133-35, that Congressional power extends to wetlands that are *adjacent* to, and thereby directly affect, navigable waters (at least arguably). But even if *Riverside Bayview* remains good law after *SWANCC*, extending that holding to cover "waters" that are not adjacent to navigable waters, and even "wetlands" that are not waters at all, merely because of some ultra-tenuous connection many steps removed from the navigable waters themselves, would simply obliterate any limits on the Commerce power. Indeed, even a tenuous connection would apparently not be necessary. Wholly isolated waters, such as the gravel-pit puddles at issue in *SWANCC*, would be "connected" to navigable waters by virtue of the fact that water evaporates, forms clouds, and then at some point rains into navigable waters.

soever with navigable waters, demonstrating that water quality, not navigability, was Congress's chief concern. 33 C.F.R. § 328.3(a)(3); *see also* 33 U.S.C. § 1251(a). That is a police power purpose, and reliance on the Commerce Clause power is mere pretext for its exercise.

As the facts of these cases make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see, e.g., South Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See, e.g., Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of isolated wetlands (and the localized ecologies that might arguably depend on them), is pitted against the need for housing and the property rights of Petitioners. The balancing of those competing interests was undertaken here by the appropriate state authorities, and there is not a hint of suggestion that in granting permits to Petitioners the local authorities acted to favor their own state's citizens at the expense of citizens in other states, much less at the expense of commerce in other states.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g., Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to

the States, and hence on state sovereignty, in the much more substantial way presented by the Corps' interpretation of the Clean Water Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 529 U.S. 598 (2000); *Missouri* v. *Illinois.*, 180 U.S. 208 (1901). Even for waters that touch upon two or more States, the States remain free to enter into agreements to regulate the waters to their mutual benefit. *See, e.g., Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. CONST., ART. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Michigan provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are exclusively borne by the people of

Michigan. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the Corps and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

IV. The Department of Justice Should Have Confessed Error Once This Court Issued Its Ruling in *SWANCC*.

Although we are of the opinion that, under *Lopez*, the *Rapanos* litigation was illegitimate from the outset, there was at the time it was commenced at least a (barely) colorable ground for the government's position that *Lopez* and *Morrison* dealt with state criminal law, not environmental law, and that somehow the Commerce Clause permitted a broader scope of federal regulatory power in the latter context than in the former. That argument was rebuffed pretty soundly by this Court in *SWANCC*, but instead of dropping the criminal prosecution in *Rapanos I*, and the subsequent civil actions at issue here, the government adopted the astounding position that *SWANCC* was limited to the "migratory bird rule" and had nothing to say about other, equally tenuous connections to interstate commerce being proffered as sources of the broad regulatory power being asserted by the Corps of Engineers—essentially ignoring the entire last section of this Court's opinion in *SWANCC*.

Nor did the government's back-of-the-hand treatment of *SWANCC* end with the Corps of Engineers overly-zealous advocacy of its expansive claims of power. Once *SWANCC* was decided, these cases called out for the government to confess error, but the Department of Justice instead vigorously pressed the matter in the *Rapanos I* criminal action, both at the Court of Appeals and by successfully opposing the petition for certiorari filed with this Court, and it continued to press the matter in the subsequent civil actions at issue here.

We do not mean to suggest that government attorneys should not be zealous advocates of the government's well-grounded positions. But zealous advocacy of positions that are, at best, barely colorable is a different matter, or at least should be. It may be that the Department of Justice now views its role as simply that of advocate for its government agency clients rather than for the Constitution. *Compare Confirmation Hearing on the Nominations of Larry D. Thompson to be Deputy Attorney General and Theodore B. Olson to be Solicitor General of the United States*, Hearing Before the S. Comm. on the Judiciary, 107th Cong. 127 (2001) (statement of Theodore Olson) (Sup. Doc. No. Y4.J89/2:S.HRG.107-250) (noting Justice Department's "responsibility to do everything it can within reason to defend the constitutionality" even of statutes that President believes to be unconstitutional), and "*Presidential Authority to Decline to Execute Unconstitutional Statutes*," 18 OP. OFFICE OF LEGAL COUNS. 199 (1994) ("[I]f the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue"), *with Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 497 U.S. 547, 551 (1990) (noting that, in an *amicus curiae* brief filed by then-Acting Solicitor General Roberts, the United States contended that a race-based allotment of broadcast licenses was unconstitutional despite the position of the Respondent FCC to the contrary). If so, then the Department should no longer benefit from the traditional deference that it has been afforded by this Court. *See, e.g., Virginia Dep't of Ed.* v. *Riley*, 106 F.3d 559, 566 (CA4 1997) (Luttig, J., dissenting in an opinion adopted by the majority at the rehearing en banc) (discussing the "traditional respect accorded to the Department [of Justice]" by courts).

CONCLUSION

The decisions of the United States Court of Appeals for the Sixth Circuit should be reversed. The Corps of Engineers' expansive interpretation of the Clean Water Act should be invalidated.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

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In The
Supreme Court of the United States

JOHN A. RAPANOS, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL, *ET AL.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CROPLIFE AMERICA, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL COUNCIL OF FARMER COOPERATIVES, NATIONAL PORK PRODUCERS COUNCIL, DAIRY PRODUCERS OF NEW MEXICO, KANSAS LIVESTOCK ASSOCIATION, AND TEXAS CATTLE FEEDERS ASSOCIATION IN SUPPORT OF PETITIONERS

Richard E. Schwartz
Counsel of Record
Ellen Steen Greer
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

THE LEX GROUP^{DC} • 1750 K Street, NW • Suite 475 • Washington, DC 20006

QUESTIONS PRESENTED

Amici Curiae CropLife America, et al. will address the following question:

Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" encompass any and all nonnavigable waters with any "hydrological connection" to navigable waters?

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INTEREST OF *AMICI CURIAE*[1]

CropLife America ("CLA") is a nationwide not-for-profit trade organization representing manufacturers, formulators, and distributors of crop protection and pest control products. Its member companies produce and sell virtually all the active compounds used in crop protection products registered for use in the United States.

National Cattlemen's Beef Association ("NCBA") is the national trade association representing U.S. cattle producers - the largest sector of American agriculture. Established in 1898, NCBA today represents more than 25,000 independent cattlemen and more than 60 state and breed affiliates representing over 230,000 cattle producers, breeders, and feeders across the United States. NCBA works to advance the economic, policy, and social interests of the U.S. cattle business.

National Corn Growers Association ("NCGA") represents more than 33,000 dues-paying members from 48 states, as well as more than 300,000 farmers who contribute to corn check-off programs in 19 states. NCGA's mission is to create and increase opportunities for corn growers.

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[1] Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief. Written consents of the parties to the filing of this brief have been filed with the clerk.

National Council of Farmer Cooperatives ("NCFC") is a national association representing America's farmer cooperatives. There are nearly 3,000 farmer cooperatives across the U.S. whose member-owners include a majority of our nation's more than 2 million farmers, ranchers, and growers. These farmer cooperative businesses handle, process, and market agricultural commodities and related products; furnish farm supplies; and provide credit and associated financial services to their farmer members.

National Pork Producers Council ("NPPC") is a non-profit trade association that represents approximately 75,000 pork producers through 44 affiliated State associations. NPPC's mission includes public policy outreach on behalf of these farmers, including efforts to promote the passage and implementation of laws and regulations that are conducive to the production and sale of pork.

Dairy Producers of New Mexico ("DPNM") is a voluntary, non-profit, grassroots agriculture association representing New Mexico and West Texas dairy producers. With approximately 170 dairies, New Mexico has been ranked seventh in the nation for milk production. DPNM represents the majority of those dairies, acting as an advocate and government liaison on behalf of its members at the local, state, and national levels.

Kansas Livestock Association ("KLA") is a not-for-profit trade association comprised of members throughout Kansas and the nation. KLA's membership encompasses all segments of the cattle industry

including cow-calf/stocker operations, purebred operations, and commercial cattle feeding operations. KLA has over 5,500 members who own land and livestock in Kansas and in other states. KLA's purposes include the representation of its members' interests in all branches of government - executive, legislative, and judicial.

Texas Cattle Feeders Association ("TCFA") is a voluntary, non-profit trade association representing most of the cattle feeders in Texas, Oklahoma, and New Mexico. Its membership consists of nearly 200 feedyards, and about 5,000 regular feeder members. TCFA area feedyards produced approximately 30% of the nation's fed beef supply - about 7,000,000 cattle - last year. Its services include legislative and regulatory agency representation and environmental quality assurance programs.

The members of the *amici* organizations engage in or provide services and supplies for agricultural activities (livestock and crop production) that are subject to regulation by the United States Army Corps of Engineers ("Corps of Engineers") and the United States Environmental Protection Agency ("EPA") for compliance with the Clean Water Act ("CWA"). Our members have repeatedly faced overbroad and vague interpretations of the CWA term "navigable waters" in permitting demands and enforcement actions by EPA and citizens group litigants alleging "discharges" to dry land features (such as ditches, swales, gullies, draws) or isolated wet areas (such as playa lakes or the wetlands at issue in these consolidated cases) at or near agricultural operations far removed from any

navigable-in-fact waterway. The federal government's expansive view of what constitutes a "navigable water" triggering CWA jurisdiction imposes substantial and inappropriate permitting obligations and enforcement liability upon the members of the *amici* organizations and will continue to do so absent an interpretation of "navigable waters" from this Court that better comports with the CWA's plain language and with this Court's precedent.

SUMMARY OF ARGUMENT

This Court's decision on the proper scope of the term "navigable waters" will determine which areas are subject to the CWA ban on unpermitted "dredge and fill" activities. It will also determine, however, which areas are subject to the comprehensive prohibition on the discharge of any "pollutant," a term that includes virtually any substance that may be emitted as a result of innumerable common land use and agricultural activities. Members of *amici* organizations, like many other land owners, have faced excessive regulation and unwarranted CWA enforcement of this prohibition under the government's view that "navigable waters" include virtually any ditch, swale, gully, drain, or low spot with any "hydrological connection" – no matter how remote – to navigable-in-fact waters. These burdens are imposed regardless of whether the pollutant "discharge" in question has reached – or could ever reach – the navigable-in-fact water (or anything even *resembling* open water).

Under the interpretation of "navigable waters" adhered to by the government and the court below, common agricultural and land use activities - crop and livestock production, construction, and pest control - are subject to severe sanctions and federal regulation if they cause the deposition of "pollutants" into virtually any roadside ditch across the land. This sweeping regulatory power strays far beyond what Congress sought to impose for the protection of "navigable waters" of the United States while explicitly preserving State and local authority over land use. It also grossly exceeds what might reasonably be grounded in Congress's goal of protecting the "aquatic ecosystems" of navigable-in-fact waters extending CWA protections as far as adjoining nonnavigable waters "inseparably bound up" with those waters.

If, as this Court has held, CWA jurisdiction is limited to navigable-in-fact waters and other waters that abut and are "inseparably bound up" with such navigable-in-fact waters, then the regulating agencies to whom Congress delegated interpretive power must clearly define these terms in a way a person of common intelligence can understand. It is unreasonable, and it offends fundamental principles of fair warning, to require a landowner either to guess or to retain an expert hydrologist to determine whether roadside ditches, natural swales, or other drainage features on or near his property - which bear no resemblance to open water - constitute "navigable waters" (including "tributaries" to navigable waters) by virtue of remote, ephemeral surface water connections. Wherever the boundary lies that defines "navigable waters," it should involve some apparent physical characteristics

of "water" (as opposed to ditches, draws, or other land features) and some reasonably apparent proximity and exchange of flow with true navigable waters. The government's definition falls far short of this requirement and is therefore unlawful.

ARGUMENT

I. THE UNITED STATES' EXPANSIVE VIEW OF "NAVIGABLE WATERS" EXTENDS ITS CLEAN WATER ACT SECTION 404 AND SECTION 402 REGULATORY POWER OVER COUNTLESS AND DIVERSE AGRICULTURAL AND LAND MANAGEMENT ACTIVITIES.

These consolidated cases involve discharges of "dredged or fill material" purportedly subject to regulation under CWA section 404. The CWA term "navigable waters," however, also defines the jurisdictional reach of CWA section 301(a), which broadly prohibits the discharge of any "pollutant" to such waters from any "point source." *See* 33 U.S.C. §§ 1311(a), 1362(12). Section 402 authorizes EPA or qualified State environmental agencies to issue National Pollutant Discharge Elimination System ("NPDES") permits for such pollutant discharges. *Id.* § 1342. "Navigable waters" thus defines not only the areas subject to the CWA ban on unpermitted "dredge and fill" activities, but also the areas subject to its comprehensive prohibition on the discharge of virtually any "pollutant," a term that includes such commonplace substances as "rock" and "sand," *id.* § 1362(6).

As explained in the *amicus curiae* brief of American Farm Bureau Federation ("Farm Bureau"), farmers and

ranchers face great uncertainty in determining whether "wetlands" on their property are subject to CWA section 404 and whether their activities might constitute a regulated "addition" of "dredged or fill material." Farm Bureau Brief 1-3. In addition, as described below, members of *amici* organizations engage in a wide range of agricultural and land management activities that have been swept into the scope of the CWA section 402 prohibition by the government's overbroad interpretation of "navigable waters." Our members, for example, have been informed by EPA, or have faced citizen litigant allegations, that the following activities involve pollutant discharges to "navigable waters":

1. **Application of fertilizer to cropland, where the fields contain wet areas with any remote hydrological connection to any navigable waters.**

Regulated pollutant discharges have been alleged where, for example, operators of swine farms irrigate cropland containing low, wet areas characterized as "wetlands" or "playa lakes." Swine producers often irrigate fields with treated wastewater from their operations, to make beneficial use of the nutrient content of animal waste for crop production. Even swine producers located in the arid Oklahoma panhandle - miles from any navigable water - have been ordered not to apply treated wastewater to these apparently isolated "wetlands" or "playa lakes." "Navigable water" status has sometimes been predicated on nothing more than a perceived "hydrological connection" via groundwater, based on

the potential for infiltration of water from these low areas into groundwater, which in turn might flow miles toward eventual recharge to a navigable surface water. Alternatively, as in these consolidated cases, "navigable water" status of these wet areas can be predicated on their proximity and potential surface hydrological connection to a ditch or drainage way that, in turn, ultimately connects to any series of channels that lead to a navigable water.

2. **Stormwater runoff from animal confinement areas that reaches a ditch or drainage way with any remote hydrological connection to any navigable water.**

Allegations of unlawful "stormwater discharges" have been asserted against dairy farms in a desert region of Eastern New Mexico located miles from any navigable water. These farms have faced CWA enforcement actions where stormwater containment measures temporarily failed, allowing runoff to reach a roadside ditch. Even if the runoff was confined to the roadside ditch itself and had no reasonable potential to reach a navigable-in-fact water, EPA and citizen litigants maintain that such discharges violate the CWA if the ditch ultimately connects to other ditches that eventually connect to any stream or other tributary of a navigable water, no matter how distant.

3. **Spills (of any size) of animal manure that reach a ditch or drainage way with any remote hydrological connection to any navigable water.**

Even in the arid West, far from any navigable water, small on-site spills of animal manure have triggered CWA enforcement actions. Such proceedings generally involve accidental dry-weather spills where animal waste enters a dry roadside ditch or other drainage feature. Typically, the spill itself would have been cleaned up by removing the animal waste before any surface water actually flowed in the ditch. Yet, so long as EPA staff or citizen litigants can identify a ditch or drainage feature affected by a spill and can point to any remote hydrological connection to navigable waters, they can allege an illegal discharge to "navigable waters."

4. **Construction of farm buildings, animal housing, feedlots, farm roads, irrigation ditches, etc., where stormwater runoff from these areas may reach a ditch or drainage way with any remote hydrological connection to any navigable waters.**

Although stormwater discharges from many agricultural activities are "agricultural stormwater discharges" excluded from CWA regulation by statute, *see* 33 U.S.C. § 1362(14), EPA views the construction of farm buildings and other agricultural structures or facilities to be "construction activities" from which stormwater discharges are subject to regulation under CWA section 402(p). *See id.* § 1342(p) and 40 C.F.R. § 122.26(b)(14)(x), (b)(15) (2005). For this reason,

agricultural operations have faced allegations of CWA liability where they have built structures on their lands without first obtaining authorization under a CWA stormwater discharge permit. As with the examples described above, permitting requirements and liability for unauthorized discharges have been alleged even for building in the most arid regions of New Mexico, Texas, and Oklahoma - miles from any navigable water - provided only that there is some ditch to which stormwater runoff might flow and some plausible, if tenuous and indirect, connection between the ditch and any navigable water.

5. Aerial application or aerial drift of pest control products to areas containing wetlands, ditches, or drainages with any remote hydrological connection to any navigable waters.

EPA's interpretation of whether, and under what circumstances, beneficial pest control products may be "pollutants" for purposes of CWA regulation has been evolving in recent years. *See Application of Pesticides to Waters of the United States in Compliance with FIFRA*, Proposed Rulemaking and Notice of Interpretive Statement, 70 Fed. Reg. 5093 (Feb. 1, 2005). Citizens groups have alleged, however, that the aerial application or aerial drift of terrestrial pesticides constitutes a CWA discharge of a pollutant if any portion of the product enters "navigable waters." Thus, under the government's interpretation of that term, crop protection activities - and even mosquito-control spraying along city and suburban streets - may constitute a regulated CWA discharge if pesticide

enters any ditch or drainage feature remotely connected to navigable waters.

* * *

In none of these situations is it deemed relevant whether the pollutant discharge has reached, or could ever affect, the navigable-in-fact water that is purportedly the object of the CWA's protective regulatory scheme. Instead, any ditch, drainage way, or low spot itself is deemed to be a "navigable water" - subject to the full breadth of CWA prohibitions and sanctions - based on any hydrological connection, no matter how ephemeral or remote, to a navigable-in-fact water. Because most ditches and drainages flow *somewhere* after a heavy rain, in the government's view virtually any discharge of any "pollutant" to any ditch, drainage way, or low spot may be regulated.

II. THE CLEAN WATER ACT CANNOT REASONABLY BE INTERPRETED TO AUTHORIZE THE REGULATION OF DISCHARGES TO EACH AND EVERY WETLAND, DITCH, OR DRAINAGE WAY WITH ANY "HYDROLOGICAL CONNECTION" TO A NAVIGABLE WATER.

As observed by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, Congress plainly sought in the CWA to preserve State and local power over the regulation of land use. 531 U.S. 159, 174 (2001); *see* 33 U.S.C. § 1251(b) (describing statutory goal to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the

development and use . . . of land and water resources . . . ."). Given this explicit design - along with the equally plain focus on waters that are, have been, or could be navigable in fact (*see SWANCC*, 531 U.S. at 172; Farm Bureau Brief 7-10) - the CWA cannot reasonably be stretched to authorize federal regulatory authority over any activity, anywhere, that results in the deposition of any pollutant into virtually any ditch, drainage way, or wetland. That is precisely the result, however, where "navigable water" status arises from nothing more than a mere "hydrological connection" to a navigable-in-fact water.

As demonstrated in these examples, in addition to several judicial decisions in line with the rulings under review here,[2] an ordinary roadside ditch - even one that is typically dry and far from any open water - can be deemed a "tributary" and therefore a "navigable water" by virtue of its "hydrological connection," no matter how remote, to navigable-in-fact waters.[3] The result is that common agricultural and land use activities - crop and livestock production, construction, and pest control - are subject to severe sanctions and federal regulation if they cause the deposition of "pollutants" into virtually any roadside ditch. Setting

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[2] *See, e.g., United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), *petition for cert. filed* Nov. 11, 2005 (No. 05-623); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

[3] As explained in the brief of *amicus curiae* National Association of Home Builders (at 13-16) the term "open water" is synonymous with navigable-in-fact water.

aside whether such sweeping regulatory power would be within the scope of Congress's authority over the channels of commerce, it strays far beyond what Congress sought to impose for the protection of "navigable waters" of the United States.

III. "NAVIGABLE WATERS" ARE PROPERLY LIMITED TO WATERS THAT ARE (OR COULD BE) NAVIGABLE OR THAT ABUT AND ARE "INSEPARABLY BOUND UP" WITH SUCH NAVIGABLE-IN-FACT WATERS.

The court below, the Corps of Engineers, and EPA have misconstrued this Court's references in *SWANCC* to a "significant nexus" with navigable waters, 531 U.S. at 167, and in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985), to include the movement of water in "hydrologic cycles." *See* Pet. App. A21 (Sixth Circuit *Rapanos* ruling that nonnavigable waters, to be deemed "navigable waters," must have a "hydrological connection or some other 'significant nexus' to traditional navigable waters"). As any fair reading of *SWANCC* and *Riverside Bayview* makes plain, "navigable water" status requires far more than a mere "hydrological connection" to navigable-in-fact waters. Indeed, if Congress's focus on the protection of "navigable waters" is to have any effect at all, as required under *SWANCC*, 531 U.S. at 172, then the CWA must target "waters" (as contrasted with land features such as ditches) that are (or could be) navigable-in-fact or that abut and are "inseparably bound up" with navigable-in-fact waters.

In *SWANCC*, the Court reiterated its *Riverside Bayview* reasoning that the Corps could reasonably regulate wetlands *adjacent* to navigable waters because they had been found by the Corps to be "waters" that are "inseparably bound up" with the navigable waters. 531 U.S. at 167 Regulation of nonnavigable waters "inseparably bound up" with the navigable waters was, in the Court's view, consistent with Congress's intent to protect the "aquatic ecosystem" of the navigable waters. *Id.*; *see Riverside Bayview*, 474 U.S. at 133-34 (discussing Corps' finding that wetlands adjacent to navigable-in-fact waters generally play a key role in protecting and enhancing the quality of those waters). The Court thus confirmed in *SWANCC* its prior finding that CWA jurisdiction encompasses "nonnavigable wetlands adjacent to open waters," but emphatically declined to extend it to nonnavigable waters (in *SWANCC*, ponds) that are *not* "adjacent to open water" and therefore generally need *not* be protected to preserve the "aquatic ecosystem" of the navigable-in-fact waters. 531 U.S. at 167-68, 172.

Similarly here, the Court should decline the invitation to extend CWA "navigable water" protection to nonnavigable waters (here, wetlands) that merely abut *other* nonnavigable surface features (here, ditches and drains, which are not "waters" at all), which in turn connect directly or indirectly to navigable-in-fact waters. Whether the wetlands at issue are connected by surface flow to ditches and drains (as in *Rapanos*) – or whether those wetlands are adjacent to but do not exchange surface flow with ditches and drains (as in *Carabell*) – these wetlands are plainly not adjacent to *or* "inseparably bound up" with any navigable-in-fact

water. The regulation of discharges to such nonnavigable features, which are only remotely "connected" to navigable-in-fact waters, cannot rationally be grounded in Congress's goal of protecting the navigable waters.

IV. THE INTERPRETATION OF "NAVIGABLE WATERS" MUST PROVIDE FAIR WARNING TO FARMERS AND OTHER ORDINARY PEOPLE THAT THEIR CONDUCT COULD VIOLATE THE CLEAN WATER ACT.

"Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952). To avoid such a trap, the terms "navigable waters" and "waters of the United States" must be interpreted in terms that are sufficiently definite to provide "fair warning" to ordinary persons as to whether their conduct violates the CWA. *Id.* In addition, statutes must be construed "so as to avoid a danger of unconstitutionality." *United States v. Harriss*, 347 U.S. 612, 618 (1954).

The Corps' (and EPA's) regulation interprets "navigable waters" to include not only navigable-in-fact waters, but also "tributaries" to such waters, as well as wetlands "adjacent" to "tributaries" to navigable-in-fact waters. This interpretation – particularly given the breadth of the government's view of "tributaries" – violates the constitutional requirement of definiteness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The

underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 617.

As demonstrated in these consolidated cases and in the examples described in Section I above, the government's interpretation of "tributaries" sweeps in every ditch or "drain" (and presumably every swale, gully, or draw) that after a storm may contain water, which in turn may enter a chain of other nonnavigable, intermittently flowing geographic features toward an ultimate connection with a navigable-in-fact water. No such formulation can be meaningfully applied by farmers or other landowners who may be many miles and many ditches removed from any actual navigable waterways.

It is unreasonable to require a landowner either to guess or to retain an expert hydrologist to determine whether roadside ditches, natural swales, or other drainage features on or near his property constitute "tributaries" to navigable waters by virtue of remote, ephemeral surface water connections. Put differently, no landowner should have to hire a hydrologist to determine whether common farming and land management activities are subject to regulation. Yet that is precisely what is required to determine whether the Corps' and EPA's "navigable waters" definition applies to ordinary ditches, drains, and other geographic features of the sort deemed here to be "tributaries." While the United States has been more than willing to initiate CWA enforcement actions on the basis of such fluid and ill-defined terms, "the vagueness doctrine bars enforcement of a statute which

either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal quotations omitted).

To satisfy the constitutional requirement for definiteness and avoid the "vice of vagueness," *Cardiff*, 344 U.S. at 176, the terms "navigable waters" and "waters of the United States" must be defined so as to provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible *the line should be clear.*" *Id.* at 265 (emphasis added) (internal quotations omitted). If, as this Court has held, CWA jurisdiction is limited to navigable-in-fact waters and waters that abut and are "inseparably bound up" with such navigable-in-fact waters, then the regulating agencies to whom Congress delegated interpretive power must clearly define these terms in a way a person of common intelligence can understand. Wherever the boundary lies, it should involve some apparent physical characteristics of "water" (as opposed to any ditch, drainage way, or draw) and some reasonably apparent proximity to and connection with navigable-in-fact waters. The current definition falls far short of this requirement and is therefore unlawful.

CONCLUSION

The judgments of the Sixth Circuit should be reversed.

Respectfully submitted,

Richard E. Schwartz
Counsel of Record
Ellen Steen Greer
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

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Supreme Court of the United States

JOHN A. RAPANOS, *et ux.*, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF JARED M. DIAMOND, PAUL R. EHRLICH, HAROLD A. MOONEY, GORDON H. ORIANS, STUART L. PIMM, SONDRA POSTEL, PETER H. RAVEN, JOHN W. TERBORGH, DAVID S. WILCOVE, AND EDWARD O. WILSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400

Counsel for Amici Curiae

January 12, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF THE *AMICI CURIAE*

Amici are prominent scientists in the fields of biology, botany, zoology, entomology, and ecology.[1] They have special knowledge of the important nexus of tributaries and adjacent wetlands to downstream water bodies and aquatic ecosystems, and other issues before this Court. Their scientific expertise enables them to explain the economic and ecological consequences of polluting or filling wetlands and tributaries, including the resulting loss of ecosystem functions, wildlife habitat, and biodiversity. Understanding these impacts is necessary to appreciate fully the substantial effects of altering wetlands and tributaries on interstate commerce, and why, under the Court's jurisprudence, Congress is empowered to regulate such activities.

Amici include, in alphabetical order:

Jared M. Diamond is Professor and Vice Chair, Department of Physiology, UCLA Medical School. Dr. Diamond is an explorer of New Guinea bird fauna, and inventor of the concept of assembly rules in community organization. Although his formal training was in physiology and membrane biophysics, Dr. Diamond has pursued a parallel career in ecology and evolutionary biology. Since 1977, he has devoted much of his time to popular science writing including the bestselling books *Guns, Germs and Steel: The Fates of Human Societies*, for which he was

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of consent with the Clerk of the Court.

awarded the Pulitzer Prize, and *Collapse: How Societies Choose to Fail or Survive*.

Paul R. Ehrlich is President, Center for Conservation Biology and Bing Professor of Population Studies at Stanford University. Dr. Ehrlich is a fellow of the American Association for the Advancement of Science, the American Academy of Arts and Sciences, and the American Philosophical Society, and a member of the National Academy of Sciences. He is a recipient of the First AAAS/Scientific American Prize for Science in the Service of Humanity and the Royal Swedish Academy of Sciences, Crafoord Prize in Population Biology and the Conservation of Biological Diversity (an explicit replacement for the Nobel Prize for areas where the Nobel is not given).

Harold A. Mooney is the Paul S. Achilles Professor of Environmental Biology at Stanford. Dr. Mooney is a member of the National Academy of Sciences, the American Academy of Arts and Sciences, a Fellow of the American Association for the Advancement of Science, and past president of the Ecological Society of America and the American Institute of Biological Sciences. His research has earned him the Ecological Society's Mercer Award and Eminent Ecologist Award, Germany's Max Planck Research Award and Humboldt Senior Distinguished Scientist Award.

Gordon H. Orians is Professor Emeritus of Biology, University of Washington. Dr. Orians is a member of the National Academy of Sciences, the American Academy of Arts and Sciences, and a past president of the Ecological Society of America. His publications are focused on behavioral ecology, plant-herbivore interactions, community ecology, the ecology of rare plants, and human ecology.

Stuart L. Pimm is the Doris Duke Professor of Conservation Ecology, Duke University. Dr. Pimm is a conservation biologist and ecologist, 1993 Pew Scholar in Conservation and the Environment, and author of *The Balance of Nature? Ecological Issues in the Conservation of Species and Communities* and *The World According to Pimm: A Scientist Audits the Earth*. Dr. Pimm's expertise lies in species extinctions and what can be done to prevent them. He also studies the loss of tropical forests and its consequences to biodiversity. He has conducted research in the Florida Everglades for fifteen years.

Sandra Postel is Director of the Global Water Policy Project in Amherst, Massachusetts, a Visiting Senior Lecturer in Environmental Studies at Mount Holyoke College, and a senior fellow with the Worldwatch Institute. A leading authority on international freshwater issues, Postel has authored several books and more than 100 articles for popular and scholarly publications on the nature of global water challenges and constructive solutions to them. Her short book, *Liquid Assets: The Critical Need to Safeguard Freshwater Ecosystems*, was released in 2005. Postel is a 1995 Pew Scholar in Conservation and the Environment and in 2002 was named one of the "Scientific American 50," by *Scientific American* magazine.

Peter H. Raven is Director of the Missouri Botanical Garden and the George Engelmann Professor of Botany at Washington University in St. Louis. Dr. Raven is past Chair of the Division of Earth and Life Studies, U.S. National Research Council. A MacArthur Fellow and member of the National Academy of Sciences and American Academy of Arts and Sciences, he is a world leader in the fields of plant evolution and systematics.

John W. Terborgh is the James B. Duke Professor of Environmental Science and Co-Director of the Center for Tropical Conservation at Duke University. An authority on avian and mammalian ecology in neotropical forests, Dr. Terborgh is a member of the National Academy of Sciences. He is a MacArthur Fellow and was awarded the National Academy of Sciences Daniel Giraud Elliot medal for his research and his book *Diversity and the Tropical Rainforest.*

David S. Wilcove is Professor of Public Affairs and Ecology and Evolutionary Biology at the Woodrow Wilson School, Princeton University. Dr. Wilcove previously served as Senior Ecologist at Environmental Defense, Senior Ecologist for The Wilderness Society, and Research Scientist in Zoology for The Nature Conservancy. A recipient of the Distinguished Service Award of the Society for Conservation Biology, he has authored numerous publications, including *The Condor's Shadow: The Loss and Recovery of Wildlife in America* (1999).

Edward O. Wilson is Curator of Entomology at the Museum of Comparative Zoology, and Pellegrino University Professor Emeritus, Harvard University. Dr. Wilson's research interests include evolutionary sociobiology, biogeography, and ethical philosophy. A recipient of the National Medal of Science, the International Prize for Biology, the Distinguished Humanist Award from the American Humanist Association, and the Crafoord Prize from the Swedish Academy of Sciences, he has written over a dozen books, including *On Human Nature* and *The Ants* for which he was awarded Pulitzer Prizes in 1979 and 1991, respectively. His book, *The Diversity of Life*, has been described as the sequel to Darwin's *Origin of Species.*

SUMMARY OF THE ARGUMENT

As scientists who have devoted their lives to the study of nature and the conservation of ecosystems and biodiversity, *Amici* come to this case with great concern for the future of freshwater ecosystems and the laws that protect them. In this submission, *Amici* will explain the importance of tributaries and wetlands to achieving the goals of the Clean Water Act. 33 U.S.C. §§ 1251 *et seq*. *Amici* will further demonstrate how the loss of wetlands and degradation of aquatic ecosystems substantially affects interstate commerce and warrants a comprehensive federal response.

Petitioners seek an interpretation of the Clean Water Act that would largely limit its reach to navigable-in-fact waters. From the perspective of scientists, legal "navigability" is irrelevant to the ecological and economic values aquatic ecosystems provide and should not be a practical or constitutional barrier to Congress's ability to protect and maintain the health of the nation's waters. Limiting the reach of the Act in this manner would seriously undermine Congress's stated purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Likewise, the Court should not adopt a reading of the Commerce Clause that would strip Congress of its power to regulate tributaries, adjacent wetlands, and other similar environmental resources.[3] Such an unprecedented

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[3] Congress is empowered by the Commerce Clause to regulate three "broad categories of activity" – the channels of interstate commerce; the instruments of interstate commerce, and persons or things in interstate commerce; and activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). As the government and other *amici* will address Congress's authority to

(Continued on following page)

holding could have far-reaching effects, and, importantly from *Amici*'s perspective, would reflect a profound misunderstanding of ecosystem functions and their relation to interstate commerce. Considered in the aggregate, degradation of wetlands and tributaries impairs ecosystem functions that are vital for human well-being and biodiversity. Indeed, this Court recently reaffirmed that the commerce power extends even to purely intrastate, noncommercial acts, provided the acts are part of a comprehensive statutory scheme to address activities that in the aggregate substantially affect interstate commerce. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). As the noted environmental law professor Richard Lazarus has recognized, "Environmental laws inevitably regulate and affect commerce because the nation's natural resources supply, after all, what are literally the basic ingredients of commercial life." Richard J. Lazarus, *The Making of Environmental Law* 205 (2005).

Natural resources are the building blocks of commerce, with none more important than water – a valuable and increasingly scarce commodity in itself.[3] In the last century, federal water policy rarely worked in concert with nature; water projects from the Everglades to the

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regulate the degradation of tributaries and wetlands as channels of commerce, this brief focuses on the substantial effects of these activities on interstate commerce.

[3] It has been said that "if the world fought for oil in the 20th Century, the war will be about water in the 21st Century." *Water: Is it the 'Oil' of the 21st Century? Hearing Before the Subcomm. on Water Res. and the Env't of the House Comm. on Transp. and Infrastructure*, 107th Cong., May 22, 2003. The quote is attributed to Ismail Serageldin, former World Bank Vice President and Chairman of the Global Water Partnership.

Mississippi Delta to the Colorado River fundamentally altered intact ecosystems. To be sure, these dams, levees, river diversions, and other engineering projects provide much of the nation's drinking water, food, electricity, and flood control. But intact aquatic ecosystems provide significant economic services of their own. More than a source of water and fish, the nation's rivers, lakes, and wetlands store flood waters and reduce economic devastation due to flooding. They recharge groundwater, filter pollutants, and purify drinking water. And they provide the habitats that sustain a diversity of species, which themselves perform important ecological functions. These ecosystem services – and their potential loss – profoundly affect interstate commerce and warrant comprehensive federal protection.

Reasonable people can disagree over language, and it is for the Court to decide questions of law. But when it comes to the connection of tributaries, streams, and wetlands to navigable waters and interstate commerce, there is no ecological ambiguity. In the opinion of *Amici*, if the Clean Water Act does not protect these resources, then it does not protect navigable waters from pollution, and it cannot achieve its goals.

A ruling for Petitioners would elevate the short-term interests of a few over the long-term economic and ecological health of the nation. It would deny indisputable ecological connections and compromise a generation of environmental progress.

ARGUMENT

I. FROM A SCIENTIFIC PERSPECTIVE, PROTECTION OF TRIBUTARIES AND ADJACENT WETLANDS IS ESSENTIAL TO ACHIEVING CONGRESS'S GOAL OF RESTORING AND MAINTAINING THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF THE NATION'S WATERS.

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, prohibits discharges of pollutants into navigable waters unless authorized by permits granted under other sections of the Act. Principle authorizing sections include Section 402, which governs the discharge of waste, 33 U.S.C. § 1342, and Section 404, which authorizes the U.S. Army Corps of Engineers ("the Corps") to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Although the statute's reach is linked to the term "navigable waters," Congress broadened the traditional definition to include "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Moreover, Congress made clear that the purpose of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). These goals extend beyond traditional notions of navigability and manifest Congress's farsighted desire to achieve through comprehensive national policies "water quality which provides for the protection and propagation of fish,

shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2).[4]

Aquatic ecology makes clear the complex interdependencies of freshwater ecosystems and the many valuable benefits they provide. Rivers, lakes, streams, wetlands, and aquifers – in concert with forests, grasslands and other terrestrial ecosystems – provide water supplies for irrigation, industry, cities, and homes; purification and filtration of pollutants; flood mitigation; drought mitigation; groundwater recharge; water storage; wildlife habitat and nursery grounds; soil fertility maintenance; nutrient delivery to deltas and estuaries; freshwater flows to maintain estuarine salinity balances; recreational opportunities; and conservation of biodiversity, which provides resilience and options for the future. Sandra Postel, Worldwatch Institute, *Liquid Assets: The Critical Need to Safeguard Freshwater Ecosystems* 12 (2005); Millennium Ecosystem Assessment, World Resources Institute, *Ecosystem and Human Well-Being: Biodiversity Synthesis* 15 (2005).

These functions and relationships are important national interests protected directly and indirectly by the Clean Water Act. As the term "navigable waters" applies to the entire Act, not merely section 404, a restrictive interpretation of that term would seriously undermine Congress's ability to protect and maintain the integrity of the Nation's waters and the services they provide. Indeed, such a ruling would limit Congress's reach over wetlands

[4] Indeed, protection of navigation is not even a stated purpose of the Act (presumably because the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, already does so). 33 U.S.C. § 1251.

and point sources alike.[5] Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rep. 10187, 10187 (2004).

As this brief demonstrates, wetlands and tributaries are inexorably bound up with navigable waters and are a critical part of riverine ecosystems. Traditional navigability may be relevant to waters that serve literally as channels of commerce, but the national interest in clean water is much more extensive and its protection substantially affects interstate commerce. "Whether or not a specific water body is 'navigable,' 'nonnavigable,' or physically 'adjacent' to another navigable body is generally irrelevant [to protecting aquatic ecosystem functions] and is certainly not dispositive of the question of whether national regulation is needed or appropriate." Lazarus, *supra*, at 205. To effectuate Congress's intent in passing the Clean Water Act – to protect and restore the waters of the United States – federal protections must extend beyond merely traditional navigable waters.

A. Wetlands and tributaries have a significant nexus to navigable waters based on hydrological and other connections.

Wetlands are complex ecosystems that are seasonally or permanently covered with shallow water, or lands in which the water table is near enough to the surface to

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[5] The wetlands provisions of section 404, like sections 402 (discharge of waste) and 311 (governing oil facilities), are not themselves prohibitive. 33 U.S.C. §§ 1321, 1342, 1344. Taken together, each provides for exceptions to section 301, which prohibits discharges into waters of the United States. 33 U.S.C. § 1311. A definitional ruling affecting section 404 thus also impacts all discharges regulated by section 301.

cause the formation of hydric soils and growth of hydrophilic plants. Despite the myriad benefits wetlands provide humans and animals alike, until the mid-1970s federal policy specifically encouraged draining and filling of wetlands for mosquito control and to promote agricultural, commercial, and residential development. By the mid-1980s, approximately fifty-three percent of the nation's original wetlands were lost. National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* 1 (2001). Although wetland loss has slowed in the past decade, the U.S. Fish and Wildlife Service estimates an average of 58,545 acres of wetlands were lost each year from 1986 to 1997. *Id.* at 3.

Many wetlands, like marshes that border lakes and streams, have obvious connections to surface waters. Others may appear to be isolated, but wetlands are almost always linked to stream networks and other wetlands through groundwater. Although freshwater ecosystems are diverse, depending on type, location, climate, and other factors, their structure and functions are intricately linked to the watershed of which they are a part. Through the hydrological cycle – the sun-fueled movement of water among the sea, air, and land – water moves through a landscape in three dimensions. Water connects upstream to downstream ecosystems, stream channels to floodplains and wetlands, and surface waters to ground water. This process also delivers natural materials – and man-made pollutants – into rivers, lakes, and estuaries.

Ecologists frequently refer to "aquatic and related terrestrial ecosystems" in recognition of the difficulty of analyzing aquatic environments without considering linkages to adjacent terrestrial environments. National Research Council, *Valuing Ecosystem Services: Toward*

Better Environmental Decision-Making 59 (2005). The connection between rivers and their floodplains is readily apparent, but what happens on land equally impacts these systems.

For example, the amount of nitrogen carried by major U.S. rivers has increased dramatically in recent decades as a result of terrestrial activities and wetland loss. Nitrogen levels in the Mississippi River, which drains forty percent of the coterminous United States, have tripled since the 1950s. Nitrogen causes excess algae growth, reduces recreational and aesthetic values, and contributes to low dissolved oxygen conditions that can kill aquatic organisms. The Heinz Center, *The State of the Nation's Ecosystems: Measuring the Lands, Waters, and Living Resources of the United States* 21, 36 (2002). As a result, wetlands lost in the Mississippi watershed far upstream from the Gulf of Mexico can nonetheless contribute to the formation of "dead zones" that threatens the Gulf's fisheries and aquatic resources.[6]

Additionally, some 20% of groundwater wells and 10% of streams in farmland areas exceed drinking water standards for nitrate, while more than half of America's larger rivers, three-quarters of farmland streams, and two-thirds of urban/suburban streams contained phosphorous levels at or above Environmental Protection Agency ("EPA") recommended levels for avoiding excess algae. *Id.* at 21. Three-quarters of stream samples and half of stream

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[6] "Dead zones" form when fertilizers and other pollutants high in nitrogen and phosphorus are washed by rain into rivers, bays, and estuaries. The compounds feed an explosive growth of algae, which, in turn, die and rot. Bacteria devouring such decaying matter consume oxygen, suffocating marine life.

sediments tested were found to contain one or more chemical compounds exceeding guidelines for protection of aquatic life, and 60% of estuary sediments exceeded levels that indicate negative effects on aquatic life. *Id.* at 37.

Tributaries, streams, and adjacent wetlands have important connections that affect the ecological and economic functions of navigable waters. Surface and subsurface hydrological connections include overbank flow and flood connections, groundwater and drainage connections, and man-made conveyances such as ditches, culverts, dams, canals, and channels. Waste discharged into streams and tributaries can thus have significant deleterious downstream impacts. As Judge Posner correctly noted, "A ditch can carry as much water as a stream; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart." *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-06 (7th Cir. 2005).

Biological connections include the use of streams, ponds, and wetlands by fish, waterfowl and wetland-dependent birds, amphibians, reptiles, insects, and plants. Many aquatic and semi-aquatic animals move between land-locked wetlands, streamside wetlands, and stream channels. Animals, including many spawning fish, often use different parts of the aquatic environment at different points in their life cycles; thus wildlife and food webs also link wetlands to larger waterways. *See generally* Judy L. Meyer *et al.*, American Rivers, *Where Rivers Are Born: The Scientific Imperative for Protecting Small Streams and Wetlands* (2003). Finally, as discussed in greater detail *infra* tributaries and wetlands are connected economically to navigable waters through tourism, recreation, and the municipal, commercial, and industrial uses of the waters they provide.

Notably, neither the text of the Clean Water Act, the implementing regulations, nor this Court currently conditions federal jurisdiction over wetlands and tributaries on the presence of hydrological or ecological connections to navigable waters. *Baccarat Fremont Developers, LLC v. United States*, 425 F.3d 1150, 1154 (9th Cir. 2005). Indeed, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court did not require such a connection, noting "[t]hat the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment" because the Corps can always grant a permit in such cases. *Id.* at 135 n.9. The *Riverside* Court correctly recognized the reasonableness of the Corps' determination that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem." *Id.* Yet even if this Court were to impose a hydrological or ecological connection standard, such a test is easily met.[7]

B. Intact freshwater ecosystems provide valuable services that sustain human life and biodiversity.

Ecosystem services are "the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life." Gretchen C. Daily, *Introduction: What are Ecosystem Services? in Nature's*

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[7] In *Baccarat*, the Ninth Circuit found such a connection based on the wetlands' proximity to flood control channels; functions that contribute to the aquatic environment, particularly in light of wetland loss in the San Francisco Bay area; location within a 100-year flood plain; and inclusion in a hydric soil unit contiguous with an area covered by tidal waters. *Baccarat*, 425 F.3d at 1157-58.

Services: Societal Dependence on Natural Ecosystems 3 (Daily, Gretchen C. ed., 1997). These include provisioning services such as water and food; regulating services such as regulation of floods, drought, land degradation, and disease; supporting services like soil formation and nutrient cycling; and cultural services such as recreational, spiritual, religious, and other nonmaterial benefits. *See generally* Millennium Ecosystem Assessment, World Resources Institute, *Ecosystem and Human Well-Being: Biodiversity Synthesis* (2005). As *Amicus* Edward O. Wilson has written:

> It is also easy to overlook the services that ecosystems provide humanity. They enrich the soil and create the very air we breathe. Without these amenities, the remaining tenure of the human race would be nasty and brief. The life-sustaining matrix is built of legions of microorganisms and mostly small, obscure animals, in other words, weeds and bugs. . . .They run the world precisely as we would wish it to be run.

Edward O. Wilson, *The Diversity of Life* 347 (1992).

Streams, tributaries, and wetlands, even those without obvious surface water connections, are integral parts of broader watersheds, and perform essential functions that affect the health of these systems. They are nature's filters and are essential to clean water. Abundant scientific evidence proves that pollution entering these upstream waters not only damages these waters and the creatures that inhabit them but will harm lakes, rivers, and waters further downstream as well. Simply put, the more wetlands and streams are destroyed, the more contaminants turn up in drinking water.

Many communities are beginning to recognize the water purification values of watersheds and are turning to

natural solutions to avoid construction of expensive water treatment facilities. New York City depends on the reservoirs and forested wetlands of the Catskill region – two-thirds of which is privately owned – for ninety percent of its water. Faced with capital costs of more than $6 billion and annual maintenance costs of $300 million for water treatment, New York City entered into an agreement in 1997 with state and federal officials, seventy towns and villages, and environmental organizations to invest $1.5 billion to restore and protect the Catskill watershed. The investment has had the desired effect; despite population pressures water quality is maintained naturally without the need for expensive filtration. New York City's program is perhaps most remarkable, but similar efforts are underway in Boston, Seattle, and other cities, with a savings of hundreds of millions of dollars in expenditures for water purification. Postel, *supra*, at 27-29.

Flood control and storm water retention are other critical ecosystem functions wetlands and tributaries provide, and the loss of these functions can contribute to the magnitude of natural events like storms and floods. The tsunami that claimed at least 227,000 lives in coastal Asia in 2004 cast a spotlight on the storm and wave protection afforded by mangrove swamps and coral reefs. *Id.* Similarly, the devastating impact of Hurricanes Katrina and Rita in the Gulf of Mexico highlighted what happens when water channelization fails and coastal wetlands lose their buffering abilities. *See* Virginia R. Burkett *et al.*, *Sea-Level Rise and Subsidence: Implications for Flooding in New Orleans, Louisiana, in U.S. Geological Survey Subsidence Interest Group Conference, Proceeding of the Technical Meeting, Galveston, Texas* 63-73 (K. R. Prince & D. L. Galloway eds., 2003). Clearing trees, filling wetlands, and engineering rivers fray

the natural safety nets that healthy ecosystems provide, at a tremendous economic cost. Indeed, economic losses from natural disasters in the last ten years (not including the devastating hurricanes of 2005) totaled $566.8 billion, topping the combined losses from 1950 to 1989. Postel, *supra*, at 48.

After the Great Midwest Floods of 1993, when the upper Mississippi and Missouri Rivers reached record heights and floodwaters breached miles of levees, researchers turned to natural solutions for flood management. They concluded that an investment of $2-3 billion to restore 5.3 million hectares of water-absorbing wetlands in the Upper Mississippi watershed would have substantially reduced flood damage, which totaled $16-19 billion. Ed Rykiel, *Ecosystem Science for the Twenty-First Century*, Bio Science, October 1997, at 705-08; Janet Abramovitz, Worldwatch Institute, *Unnatural Disasters* 158 (2001).

Even the Corps of Engineers, which is responsible for most of the nation's flood control dams and levees, has found that wetlands and floodplains can often provide the same services at less cost, with important side benefits. Purchasing development rights to 3,440 hectares of floodplain wetlands in the headwaters of the Charles River in Massachusetts for $10 million provided storage for sixty-two million cubic meters of water, negating the necessity of a proposed $100 million dam and levee project. This natural wetlands flood control system helped contain large floods in 1979 and 1982 that would otherwise have caused considerable damage. National Research Council, *Valuing Ecosystem Services: Toward Better Environmental Decision-Making* 170 (2005). In Napa Valley, California, the Corps is relocating homes, roads and businesses to restore the Napa River's natural floodplain. The $155 million

project cost is one-tenth the amount that would be needed to repair flood damage over the next century if the floodplain were not restored. *Id.* Napa Valley residents supported a sales tax increase to pay for the project, recognizing that in addition to flood control, the project would lower flood insurance rates, provide parks and trails for recreation and wildlife watching, increase tourism revenues, and revitalize town centers. Postel, *supra*, at 51.

Headwaters systems trap sediment, which moves downstream in runoff from rain, snow, and floods. Too much sediment can fill reservoirs and navigation channels, impede transportation, damage commercial and recreational fisheries, harm aquatic habitats, and increase water filtration costs. Suspended sediment turns water murky, blocking light to underwater plants and reducing the spawning productivity of fish. As it settles, sediment can smother fish eggs and fill the gravel homes of small but important organisms at the bottom of the food chain. For municipalities, sediment poses significant financial costs. Dredging and removing sediment from the Patapsco River to keep Baltimore Harbor navigable costs more than $10 million each year. Meyer *et al.*, *supra*, at 12.

Tributaries, streams, and wetlands also provide habitat for diverse flora and fauna, including numerous threatened and endangered species. Unfortunately, many species are now at risk due to alteration of freshwater ecosystems. At least 123 species of freshwater fish, mollusks, crayfish, and amphibians have gone extinct since 1900 and the extinction rate for such species is expected to be five times greater than that of terrestrial species. Anthony Ricciardi & Joseph B. Rasmussen, *Extinction Rates of North American Freshwater Fauna*, 13 Conservation Biology 1220, 1220-22 (1999). Freshwater mussels are called "living filters"

because of their skill at purifying water. The United States has more known species of freshwater mussels than any other country with 292; yet sixty-nine percent are at risk of extinction or have already gone extinct. Postel, *supra*, at 22.

Wetlands contribute significantly to the nation's ecological diversity and provide habitat for wildlife and plants. According to a new study, 274 at-risk plant and animal species are supported by wetlands. Patrick Comer *et al.*, NatureServe, *Biodiversity Values of Geographically Isolated Wetlands in the United States* 1 (2005). A total of eighty-six plants and animals listed as threatened, endangered or candidates for listing under the Endangered Species Act ("ESA"), 33 U.S.C. §§ 1531 *et seq.* – roughly six percent of all listed and candidate species in the United States – are supported by isolated wetlands. Nearly half of the wetland types studied are known to support at least one ESA listed species. *Id.* Loss of wetland habitats could seriously impact the survival of these species. The Clean Water Act plays an indirect yet critical role in protecting these biodiversity values.

C. Alteration of stream and wetland ecosystems has spillover effects on terrestrial and downstream ecosystems.

Human-caused disruptions to the hydrological cycle, over time, diminish these and other ecosystem benefits and can even lead to societal collapse – what *Amicus* Jared Diamond calls "self-inflicted ecological suicides." Jared Diamond, *Collapse: How Societies Choose to Fail or Survive* (2004). Although collapse may seem far fetched in our modern, technologically-advanced world, the fact is human society is intrinsically dependent on the water cycle. Alterations to that cycle – including loss of wetland functions – have serious implications. As *Amicus* Stuart Pimm

has noted, "wetlands provide unusually high ecosystem services and once destroyed are almost impossible to restore." Stuart Pimm, *The Value of Everything,* Nature, May 15, 1997, at 231-32.

Although human manipulation of water through irrigation, dams, canals, deep pumps, and levees – provides the skeleton upon which the world's $55 trillion annual economic output depends, these advances have come at a cost that society is only beginning to appreciate. The signs of ecosystems in peril include disappearing species, falling water tables, plunging fish populations, shrinking lakes, diminished river flows, loss of wetlands, declining water quality, and pollution-induced "dead zones." Last summer, thirty-six percent of the Chesapeake Bay – formerly one of the world's most productive and economically valuable estuaries – had less than five milligrams per liter of dissolved oxygen, the minimum level needed by aquatic life. UPI, *Large Part of Chesapeake Bay is Dead Zone*, July 26, 2005.

The Missouri River – the longest in the continental United States – is another example of a failing ecosystem. Highly dammed and channelized for barge traffic, the river's modified flow patterns have dramatically affected habitat. The loss of natural floodplains, sandbars, and shallow-water habitats on the Missouri have led to steep declines in fish and bird species and riparian vegetation. State and federal agencies list as endangered, threatened or rare sixteen species of fish, fourteen birds, three mammals, and two mussels in that watershed. Populations of caddis flies, mayflies and other invertebrates have declined seventy percent, even in the unchannelized portions of the river. Postel, *supra*, at 21.

According to *Amicus* Sandra Postel, "This syndrome of flow modification, habitat destruction, and species imperilment is playing out in river systems all over the world. Although biodiversity loss does not necessarily equate with the loss of ecosystem services, it offers a rough proxy for impacts on ecosystem health and resilience." *Id.* at 21-22. There is substantial overlap, for instance, between lands protected for their biodiversity and conservation values (such as national parks and nature reserves) and lands that supply cities with drinking water. *Id.* at 29; *see also PUD No. 1 of Jefferson Co. v. Washington Dept. of Ecology*, 511 U.S. 700, 719 (1994) ("[A] sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, a fishery.").

The pervasiveness of chemical contaminants in river systems and groundwater further illustrates the spillover effects of upstream discharges. In Great Britain, scientists discovered traces of the anti-depressant Prozac in rivers and groundwater used for drinking. Kevin Hurley, *Prozac Seeping into Water Supplies*, The Scotsman, August 9, 2004. Closer to home, the U.S. Geological Survey tested 139 streams in thirty states and found that eighty percent contained traces of at least one drug, endocrine-disrupting hormone, insecticide, or other chemical – some at levels that are known to harm fish and aquatic life. Dana W. Kolpin *et al.*, *Pharmaceuticals, Hormones, and Other Organic Wastewater Contaminants in the U.S. Streams, 1999-2000; A National Reconnaissance*, Envtl. Sci. & Tech., March 15, 2002, at 1202-11; Postel, *supra* at 37. Indeed, "no ecosystem on the earth's surface is free of pervasive human influence." Peter M. Vitousek *et al.*, *Human Domination of the Earth's Ecosystems*, 277 Science 494, 494 (1997).

D. Small impacts to ecosystems can have sudden, exponential, or irreversible effects.

The pace of human-induced change raises the very real possibility of irreversible consequences. Ecosystems have a threshold character that does not always allow for predictable analyses of cause and effect. At a certain point, ecosystem alteration – be it by filling of wetlands or chemical contamination of streams – will reach what Malcolm Gladwell has popularized as a "tipping point" and result in sudden, exponential, or irreversible change.[8] A small amount of additional pollution or habitat disturbance could lead to catastrophic consequences. Millennium Ecosystem Assessment, World Resources Institute, *Living Beyond Our Means: Natural Assets and Human Well-Being* 15 (2005); D. J. Rappaport *et al.*, *Ecosystem Behavior under Stress*, 125 Am. Naturalist 617, 626, 635 (1985). Coral reefs, for example, will collapse ecologically in response to incremental increases in contaminant concentrations or maximum water temperature. Coral Reef Information System, *Hazards to Coral Reefs*, http://www.coris.noaa.gov/about/hazards (visited January 9, 2006).

The waste assimilation and transport services of lakes, rivers, and estuaries are particularly relevant. Increases in nutrients from runoff and upstream tributaries can increase biotic productivity to the point of harmful eutrophication. That can accumulate organic matter, deplete oxygen in the water, and alter levels of nourishment – the trophic structure – in the system. But at a certain point, even if nutrient loads are reduced, these changes may persist. "From the perspective of ecosystem service assessment, waste

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[8] Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2002).

assimilation may still be occurring, but habitat services, recreational services, and maintenance of biodiversity may all be significantly changed. The point at which this abrupt shift in services occurs may be controversial and unpredictable." NRC, *Valuing Ecosystem Services*, *supra*, at 86-87. Wetland loss can dramatically impact nutrient storage.

The dynamic complexity of ecosystems and the nature of ecological injury is the context for any law or policy that would seek to manage human impacts on the environment, and ecology has shattered tidy notions of a bounded domain. Joseph Sax aptly frames the consequential dilemma for courts and policymakers: "Many things that a short time ago were thought entirely the business of a landowner within the confines of his or her own land are now revealed to be intimately interconnected with other lands and with public resources that have never been thought to belong to the owner of a given tract." Joseph Sax, *The Constitutional Dimensions of Property*, 26 Loy. L. Rev. 23, 33 (1992). Understanding ecosystem functions and values – and the downstream impacts of human activities – is thus essential to properly reconciling conflicts in environmental regulation.

II. DEGRADATION OF WETLANDS AND TRIBUTARIES SUBSTANTIALLY AND ADVERSELY AFFECTS INTERSTATE COMMERCE AND WARRANTS A COMPREHENSIVE FEDERAL RESPONSE.

A. Freshwater ecosystems provide economic services that directly affect interstate commerce.

Throughout this brief, *Amici* have illustrated the many ways that freshwater ecosystems affect human life

and contribute to the nation's prosperity. Tributaries, streams, and wetlands are a pivotal part of these aquatic systems, and their alteration has demonstrable downstream consequences that compromise water quality and quantity. Loss of wetlands and degradation of tributaries diminishes the entire system's services in water storage, water purification, sediment control, habitat for game and non-game species, and recreation.

Economic valuation can help assess the total contribution that particular ecosystems make to human well-being. *See* Millennium Ecosystem Assessment, World Resources Institute, *Ecosystem and Human Well-Being: A Framework for Assessment* (2005). Knowledge of the value of ecosystems services, in turn, can influence governments and industry alike to evaluate the consequences of alternative actions that may affect those services. In the last few decades, the field of environmental economics has made significant progress developing new approaches and methodologies to quantify the value of natural services. The total value of a wetland – taking into account water and habitat functions, as well as agricultural, industrial, and recreational values – often greatly exceeds the direct value of the wetland property for development.

For example, wetlands and floodplains benefit the public through wastewater reclamation and reuse, pollution abatement, aquifer recharge, and recreation. One recent study attempted to quantify the values of a range of ecosystem services provided by the Salt Creek Greenway in Illinois. The sum of the natural values of floodplain land, other than for flood control, was estimated at $8,177 per acre, while the estimated value of regional floodwater storage was $52,340 per acre. Combined, the total estimated value of preserved floodplain land in the greenway

was $60,517 per acre. NRC, *Valuing Ecosystem Services*, *supra*, at 170.

Biodiversity, which of course depends on water, has tremendous economic value as commodities traded in interstate commerce. Of the top 150 prescription drugs used in the United States, 118 are derived in whole or in part from natural sources: 74% from plants, 18% from fungi, 5% from bacteria, and 3% from one vertebrate snake species. Nine of the top ten drugs are based on natural plant products. Ecological Society of America, *Ecosystem Services: Benefits Supplied to Human Societies by Natural Ecosystems*, Issues in Ecology (1997), at 6; *see also* Norman Myers, *Biodiversity's Genetic Library*, *in Nature's Services*, *supra*, at 263. The commercial value of plant-derived drugs to developed nations alone during the 1990s amounted to some $500 billion. *Id.* at 264.[9]

Additionally, wetlands and tributaries contribute tremendous value for recreational pursuits. The value of the freshwater sport fishery in the U.S. as of 1991 was $16 billion. When aggregated with the employment value generated by sportfishing activities, the total reaches $46 billion. Ecological Society of America, *supra*, at 4. Nearly 2 million people participated in waterfowl hunting in 2001, spending $495 million on trip expenditures and $440 million on equipment in that year alone. U.S. Fish & Wildlife Service,

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[9] *Amicus* Edward O. Wilson's words reinforce the point. "It is fashionable in some quarters to wave aside the small and obscure, bugs and weeds, forgetting that an obscure moth from Latin America saved Australia's pastureland from overgrowth by cactus, that the rosy periwinkle provided the cure for Hodgkin's disease and childhood lymphocytic leukemia, that the bark of the Pacific yew offers hope for victims of ovarian and breast cancer, that a chemical from the saliva of leeches dissolves blood clots during surgery . . . " Wilson, *supra*, at 347.

Economic Impact of Waterfowl Hunting in the United States, at 3 (2005), http://library.fws.gov/nat_survey2001_waterfowlhunting.pdf (visited January 9, 2006). In total, people engaged in wildlife watching, fishing, and hunting activities contributed more than $108 billion in revenue in 2001 to local communities across the country.

These numbers demonstrate a significant impact on the economy, but they still do not capture the full contribution of wetlands and freshwater ecosystems to interstate commerce. *Amicus* Edward O. Wilson explains:

> The traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species. None has been totally assayed for all of the commercial profit, scientific knowledge, and aesthetic pleasure it can yield. Furthermore, none exists in the wild all by itself. Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage.

Wilson, *supra*, at 308; *National Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 n.19 (D.C. Cir. 1997) (same). The more scientists and economists are able to translate these ecosystem services into monetary terms, the more readily grasped is their substantial impact on commerce.

Courts have long considered the regulation of activities affecting the nation's waters to be within the ambit of

the Commerce Clause.[10] *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003) ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."). Indeed, the Corps and EPA regulations defining the term "waters of the United States" are premised on the fact that, because "[w]ater moves in hydrological cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system," *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)). It follows that, to achieve its statutory aims, Congress can aggregate the effects of individual discharges to tributaries or fillings of wetlands to justify regulating each of them. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

As Judge Posner aptly notes, filling a single upstream wetland "is not going to have a measurable effect on the depth of the Wisconsin or Mississippi Rivers. But that cannot be the test. The sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a

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[10] Professor Akhil Amar notes that "'commerce' also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life." So read, Congress's power to act would hinge not on the question of whether an activity had a potential economic effect but whether "a given problem genuinely spilled across state or national lines." Akhil Reed Amar, *The Constitution: A Biography* 107-08 (2005). In our view, the loss of wetlands and its consequences for biodiversity, water quality, and aquatic ecosystems generally, is a national problem with implications that transcend state boundaries. Even isolated wetlands and species contribute significantly to ecosystem health and their impact cannot be arbitrarily delimited to state lines.

perceptible effect." *Gerke*, 412 F.3d at 806 (citing *Gonzales v. Raich*, 125 S. Ct. 2195, 2205-07 (2005); *Wickard*, 317 U.S. at 118-29).

B. Maintenance of a comprehensive national scheme for protecting waters of the United States is critical to achieving the goals of the Clean Water Act and federal environmental policy.

Alteration of tributaries, streams, and wetlands implicates both the "use of the channels of interstate commerce" and "those activities having a substantial relation to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). But even if this Court decides there is no rational basis for concluding that these resources substantially affect interstate commerce – a highly dubious proposition from a scientific perspective – it should permit their regulation as a necessary part of a broader statutory scheme to protect and enhance our nation's waters.

In *United States v. Lopez*, this Court suggested that federal regulation of noncommercial, intrastate activity is constitutionally permissible under the Commerce Clause if the regulation was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Lower courts have employed this rationale to uphold the Endangered Species Act, which is a comprehensive regulatory scheme aimed at preserving the economic benefits of biodiversity and mitigating the negative effects of interstate economic competition. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214

F.3d 483 (4th Cir. 2000).[11] The same rationale applies here; the "major purpose" of the Clean Water Act was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95 (1971) (emphasis added).

Last term, in *Gonzales v. Raich*, this Court affirmed this principle's validity in Commerce Clause jurisprudence. If a class of activities is properly regulated within the ambit of the Commerce Clause, the local character of a particular activity that falls within the class is immaterial. *Raich*, 125 S. Ct. at 2209; *id.* at 2217 (Scalia, J. concurring) ("Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."); *Maryland v. Wirtz*, 391 U.S. 183, 196 n.27 (1968) ("[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence."). Moreover, both the *Raich* majority and Justice Scalia in concurrence recognized that the comprehensive scheme principle flows equally from Congress's authority to "'make all Laws

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[11] At least three circuits have upheld the ESA as a valid economic regulatory scheme. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 494 n.3 (4th Cir. 2000); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1073-74 (D.C. Cir. 2003); *see also National Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). In those cases, as here, an economic regulatory statute passed constitutional muster because Congress could rationally conclude that regulation of a broad class of activities is essential to its functionality. "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 276 (1981). As *Amici* have demonstrated, such a conclusion is not only rational but firmly grounded in science.

which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'" *Raich*, 125 S. Ct. at 2209 (quoting U.S. Const., Art. I. § 8). Not only is a ruling for the United States in the present cases consistent with the Commerce Clause, it is also supported by the Necessary and Proper Clause because regulation of upstream tributaries and adjacent wetlands is essential to the statutory scheme. *GDF Realty*, 236 F.3d at 641-42 (Dennis, J. concurring) (noting that the Necessary and Proper Clause supports the constitutionality of the ESA).

The Clean Water Act establishes a comprehensive scheme to eliminate water pollution and preserve aquatic ecosystems. Congress's intent to restore and maintain the chemical, physical, and biological integrity of the nation's waters will be seriously undercut if the modification of tributaries, streams, and adjacent wetlands "were excepted from its general scheme of regulation." *Raich*, 125 S. Ct. at 2220.

CONCLUSION

The judgments of the U.S. Court of Appeals for the Sixth Circuit in *Rapanos* and *Carabell* should be affirmed.

Respectfully submitted,

JASON C. RYLANDER*
DEFENDERS OF WILDLIFE
1130 17th Street, NW
Washington, D.C. 20036
(202) 682-9400

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Counsel for Amici Curiae

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In The
Supreme Court of the United States

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE HONORABLE JOHN D. DINGELL, THE HONORABLE JOHN CONYERS, JR., THE HONORABLE ROBERT F. DRINAN, THE HONORABLE GARY W. HART, THE HONORABLE KENNETH W. HECHLER, THE HONORABLE CHARLES McCURDY MATHIAS, JR., THE HONORABLE PAUL N. McCLOSKEY, JR., THE HONORABLE CHARLES B. RANGEL, AND THE HONORABLE SENATOR RICHARD SCHULTZ SCHWEIKER, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

KIM DIANA CONNOLLY
UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW
Main & Greene Streets
Columbia, SC 29208
(803) 777-6880

ROBERT W. ADLER
AMY J. WILDERMUTH*
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 581-6833

Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

No. 04-1034
Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

No. 04-1384
Carabell v. United States Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTEREST OF AMICI CURIAE[1]

Amici are current and former members of the United States Congress, both Republicans and Democrats, all but one of whom were members of the 92nd Congress, which in 1972 initially adopted the pivotal definitions of the Clean Water Act at issue in this case. In addition, the amici include former Senators who were members of the 95th Congress and who voted in 1977 to reaffirm the broad scope of waters protected by the Clean Water Act. All of the amici supported the Clean Water Act and many played critical roles in the development and enactment of the 1972 legislation and the 1977 amendments.

Amici include the following: The Honorable John D. Dingell of Michigan, the "Dean of the House," was elected as a Democrat to the U.S. House of Representatives by special election to the Eighty-fourth Congress and has served from December 13, 1955 to the present; the Honorable John Conyers, Jr. of Michigan was elected as a Democrat to the U.S. House of Representatives to the Eighty-ninth Congress and has served from January 3, 1965 to the present; the Honorable Robert F. Drinan was elected as a Democrat from Massachusetts to the U.S. House of Representatives to the Ninety-second Congress and served from January 3, 1971 to January 3, 1981; the Honorable Gary W. Hart was elected as a Democrat from Colorado to the U.S. Senate in 1974 and served from January 3, 1975 to January 3, 1987; the Honorable Kenneth W. Hechler of West Virginia was elected as a Democrat to the U.S. House of Representatives to the Eighty-sixth Congress and served from January 3, 1959 to January 3, 1977; the Honorable Charles McCurdy Mathias, Jr.

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[1] Under Rule 37.6 of this Court, the parties have consented to the filing of this brief by the Members and former Members of Congress. This brief was not written in whole or in part by counsel for a party, and no one other than amici and counsel made a monetary contribution to its preparation and submission.

of Maryland was elected as a Republican to the U.S. House of Representatives to the Eighty-seventh Congress and served from January 3, 1961 to January 3, 1969, and was elected to the U.S. Senate in 1968 where he served from January 3, 1969 to January 3, 1987; the Honorable Paul N. (Pete) McCloskey, Jr. was elected to the U.S. House of Representatives as a Republican from California by special election to the Ninetieth Congress and served from December 12, 1967 to January 3, 1983; the Honorable Charles B. Rangel of New York was elected as a Democrat to the U.S. House of Representatives to the Ninety-second Congress and has served from January 3, 1971 to the present; and the Honorable Senator Richard Schultz Schweiker of Pennsylvania was elected as a Republican to the U.S. House of Representatives to the Eighty-seventh Congress and served from January 3, 1961 to January 3, 1969, and was elected to the U.S. Senate in 1968 where he served from January 3, 1969 to January 3, 1981.[1]

STATEMENT OF FACTS

Both of these cases involve wetlands that either the U.S. Environmental Protection Agency (EPA) or the U.S. Army Corps of Engineers (Corps) concluded – and the lower courts directly reviewing these cases affirmed – are "[w]etlands adjacent to," 33 C.F.R. § 328.3(a)(7), "tributaries," *id.* § 328.3(a)(5), to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," *id.* § 328.3(a)(1). Accordingly, consistent with Congress' intent, these wetlands are considered "waters of the United States" and thus fall within EPA's and the Corps' authority under the Clean Water Act. See 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States, including the territorial seas").

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[1] For more complete biographies of these distinguished current and former Members of Congress, go to http://bioguide.congress.gov.

With respect to the three different sites at issue in *Rapanos*, the wetlands were all found to be "adjacent" to tributaries to traditionally navigable waters. The Corps also specifically determined, and the lower courts affirmed as findings of fact, that all three sites have a "hydrological connection to navigable waters." *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004). The first site, known as "the Salzburg wetlands," "ha[s] a surface water connection to tributaries of the Kawkawlin River which, in turn, flow into the Saginaw River and ultimately into Lake Huron." *Id.* The second wetlands site, "the Hines Road site[,] ha[s] a surface connection to the Rose Drain which, in turn, has a surface connection to the Tittabawassee River." *Id.* at 642-43. Finally, the third site, "the wetlands at the Pine River ... have a surface water connection to the Pine River, which flows into Lake Huron." *Id.* at 643.

Similarly, the wetlands at issue in *Carabell* are located next to an unnamed ditch that is connected at one end to the Sutherland-Oemig Drain, which empties into Auvase Creek, which then empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004). The other end of the ditch flows into other ditches that also outlet into Auvase Creek and eventually into the Great Lakes drainage system. *Id.* at 705-06. Although berms, which were created when wetland material was excavated to create the unnamed ditch, separate the wetlands from the ditch, the wetlands fall under the regulatory definition of "adjacent wetlands" because that term includes "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like." 33 C.F.R. § 328.3(c). Despite the clear application of the regulation to their wetlands, the *Carabell* petitioners claim the Corps has no authority to regulate their wetlands because there is no hydrological connection between the wetlands and the ditch as a result of the berms. The Corps maintains that there is an occasional surface water connection when water overtops the berms. *See* BIO at 5, 9. Moreover, the

Corps concluded that the *Carabell* wetlands provide a valuable water storage function, and that filling the wetlands would likely result in "an increased risk of erosion and degradation of water quality" in the traditionally navigable waters of the Great Lakes. 391 F.3d at 706. There is, in other words, a connection between the wetlands and the traditionally navigable waterway because the wetlands slow the flow of the surface water by first retaining it and then allowing it to slowly percolate as ground water. This, in turn, reduces scouring and erosion, which would increase pollution in traditionally navigable waters connected to these wetlands. See generally U.S. EPA, *Functions and Values of Wetlands* 1 (2001), http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf ("Wetlands function like natural tubs or sponges, storing water and slowly releasing it. This process slows the water's momentum and erosive potential, reduces flood heights, and allows for ground water recharge, which contributes to base flow to surface water systems during dry periods.").

SUMMARY OF ARGUMENT

Because wetlands adjacent to traditionally navigable waters, or adjacent to tributaries to those waters, have significant impacts on traditionally navigable waters, Congress intended for them to be subject to regulation under the Clean Water Act. When Congress adopted the Federal Water Pollution Control Act amendments in 1972, it redefined the term "navigable waters" to mean "waters of the United States" for the primary purpose of improving water quality in the Nation. This definition of waters applies broadly to the Act's water pollution control programs, including those aimed at eliminating pollution from industrial waste and raw sewage, preventing oil spills, and regulating the discharge of dredge and fill material.

Thus the EPA's and the Corps' inclusion of tributaries and "adjacent wetlands" in their regulatory definitions of "waters of the United States" and exercise of authority

over those waters is consistent with both the statute and Congress' intent. Moreover, the connection between traditionally navigable waters and these waters leaves no doubt that these cases fail to "raise the sort of grave and doubtful constitutional questions," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), that might require the Court to second-guess the Corps' almost thirty-year-old regulation. Indeed, this Court upheld the regulation of such waters over twenty years ago in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), a case that is quite similar to these. Because Congress intended for the Clean Water Act to reach the wetlands at issue here and there is no significant constitutional question raised by EPA and the Corps exercising authority over them, the Court should affirm the judgment of the Court of Appeals for the Sixth Circuit in both cases.

ARGUMENT

I. Congress Plainly Intended to Include All Tributaries and Adjacent Wetlands in the Term "Waters of the United States" and Thereby Subject Them to Regulation Under the Clean Water Act

The Clean Water Act[3] (CWA) defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The question before this Court is whether the "adjacent wetlands" at issue in these cases are properly considered "waters of the United States" and thus subject to regulation under the Clean Water Act.

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[3] The Federal Water Pollution Control Act is commonly referred to as the Clean Water Act following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977) ("SEC. 518. This Act may be cited as the 'Federal Water Pollution Control Act' commonly referred to as the Clean Water Act.").

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court held that when interpreting a statute that an agency is charged with administering, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Where one can discern Congress' intent by "employing traditional tools of statutory construction," *id.* at 843 n.9, that intent must be given effect. In this case, the intent of Congress is clear: all tributaries and adjacent wetlands like those at issue in these cases fall under the CWA.

A. Congress Intended to Include Tributaries and Adjacent Wetlands in the Term "Waters of the United States."

In passing the CWA, Congress intended to embrace the broadest possible definition of "navigable waters" when it defined that term as "waters of the United States." In particular, Congress intended that term to embrace both tributaries as well as wetlands that are adjacent to traditionally navigable waterways and wetlands that are adjacent to any tributaries connected to those waterways.

i. Congress Intended Comprehensive Protections Through the 1972 Act

The 1972 adoption of the Federal Water Pollution Control Act (FWPCA) reflected Congressional commitment to comprehensively control water pollution, including protection of tributaries and wetlands. Congress intended in 1972 to replace the original FWPCA, passed in 1948. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). That original act was limited to providing technical assistance to states, partially financing municipal sewage treatment works, and providing authority to bring public nuisance lawsuits to abate interstate water pollution when all other means failed.

S. Rep. No. 92-414, at 95 (1971). The 1948 Act left states on their own to establish treatment requirements for pollution sources and to enforce them. Despite this law, by the 1960s the deterioration of the nation's waters was alarmingly evident, and waters in many cities across the country were reduced to sewage receptacles for industrial and municipal waste. *See* Robert W. Adler, Jessica C. Landman and Diane M. Cameron, *The Clean Water Act 20 Years Later* 5-7 (1993).

During the decades leading up to the 1972 Act, the importance of wetlands to overall aquatic ecosystem functioning was steadily becoming apparent in the scientific community. The 1956 Fish and Wildlife Service's publication of Samuel P. Shaw and C. Gordon Fredine's *Wetlands of the United States*[4] provided a new vocabulary – using the generic term "wetlands" in place of terms such as "swamp" or "bog" – that "conveyed positive symbolic value born from trustworthy scientific expertise." Ann Vileisis, *Discovering the Unknown Landscape: A History of America's Wetlands* 209 (1997). Known as Circular 39, the 1956 report articulated a taxonomy of wetland types and clearly explained the value of wetlands as habitat for fish and wildlife. The authors urgently concluded that "[n]ever before in the Nation's history has it been so necessary to plan for the setting aside of land and water areas to serve the future needs of fish and wildlife." Shaw & Fredine, *supra*, at 9. As was true for other water quality matters, leaving wetlands and tributary protection in the control of individual states was not working. Public outcry demanded a strong response. See, e.g John and Mildred Teal, *Life and Death of the Salt Marsh* 262 (1969) ("This resource is much more extensive – the ribbon of green marshes along the eastern coast of North America, which

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[4] Samuel P. Shaw & C. Gordon Fredine, *Wetlands of the United States: Their Extent and Their Value to Waterfowl and Other Wildlife*, Fish and Wildlife Service Circular 39 (1956), available at http://www.npwrc.usgs.gov/resource/1998/uswetlan/uswetlan.htm.

must be preserved almost in its entirety if its preservation is to have any real meaning."); Kim Diana Connolly, Stephen M. Johnson and Douglas R. Williams, *Wetlands Law and Policy: Understanding Section 404* 2-7 (2006).

ii. The Act's Goals and Purposes and Other Provisions Indicate Congressional Intent to Assert Broad Federal Authority Over Concerns Other Than Navigation

In passing the 1972 FWPCA, Congress articulated one of the broadest ecosystem restoration and protection aspirations in all of environmental law: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.[5] Courts routinely refer to this objective as the "guiding star" of the statute, see *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1028 (10th Cir. 1976); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1236 (10th Cir. 1979), or otherwise invoke the language as the main starting point for any analysis, see, e.g., *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 703 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 105-06 (1992); *United States v. Riverside Bayview Homes*, 474 U.S. at 132.

Congress' 1972 objective was far removed from the limited goal of protecting navigation as in earlier laws like the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.* (2000), which prohibited the discharge of refuse into navigable waters "whereby navigation shall or may be impeded or obstructed." 33 U.S.C. § 407. In addition, it broadened the law's focus far beyond pollution in interstate waters as in the earlier iterations of the FWPCA.

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[5] This statutory objective is reinforced in the statutory definition of "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

Both the House and Senate reports evinced their intent to restore aquatic ecosystems as closely as possible to their natural state, which clearly extends beyond the earlier traditional intent to provide only for navigation.[6]

"To achieve this objective," 33 U.S.C. § 1251(a), Congress listed seven goals, each of which indicates concern for values other than navigability. *Id.* § 1251(a)(1)-(6). The goals of the law, including "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "programs for the control of nonpoint source pollution," are broad. *Id.* § 1251(a).

Perhaps most notably, Congress required the states or EPA to adopt water quality standards for all waters covered by the Act "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, *and also taking into consideration their use and value for navigation.*" *Id.* § 1313(c) (emphasis added). The fact that navigation was but one of many values for which the waters of the United States were provided statutory protection belies a narrow focus on only traditionally navigable waters.

Members of Congress repeatedly emphasized the sweeping purposes of the 1972 amendments. For example, in the debates leading to Congress' override of President Nixon's veto of the legislation, which the President viewed as unconscionably expensive, Representative John D. Dingell of Michigan said: "The protection of our *natural resources*, particularly our waterways which serve our *health and wildlife needs and the recreational needs of*

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[6] S. Rep. No. 92-414, at 12 (1972), *reprinted in* 1972 U.S.C.C.A.N. at 3742; H.R. Rep. No. 92-911, at 76-77 (1972), both quoted *infra*; *see also* Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 44-46 (2003).

urban and rural areas cannot in any sense whatsoever be described as unconscionable." 118 Cong. Rec. 37,058 (Oct. 18, 1972) (emphasis added). In short, Congress sought to protect water quality for a wide range of natural resource values, and not merely to preserve navigability of large waterways.

iii. The Legislative History of the Term "Navigable Waters" Indicates Congressional Intent to Broadly Cover Waters of the United States, Not Just Traditionally Navigable Waters

Both the House and Senate versions of the bills to amend the FWPCA were written to expand federal authority to control and ultimately eliminate discharges of all types of water pollution across the country. H.R. 11,896, 92nd Cong. (1971); S. 2770 92nd Cong. (1971). They both sought to restructure the nation's federal authority to control water pollution while drawing upon much of the structure and language of earlier statutes. Thus, in their original bills, both bodies borrowed the term "navigable waters" from existing laws, and originally included a definition that itself used the term "navigable."[7] However, in the reports discussing their respective versions of the legislation, members of both chambers expressed concern about potentially narrow interpretations of what waters they intended the Act to cover.

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[7] In the Senate, the definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. 502(h) (1971). The House bill's definition read "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11,896 92nd Cong. 502(8) (1971).

The House Public Works Committee stated:

> The Committee is reluctant to define the term 'navigable waters.' This is based on the fear that any interpretation would be read narrowly. This is not the Committee's intent. The Committee fully intends the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

H.R. Rep. No. 92-911, at 76-77 (1972). The Senate Committee on Public Works likewise stated:

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. Rep No. 92-414, at 77 (1971).

Although the House report focused on the need for a broad constitutional interpretation of the Act's scope while the Senate report spoke to the scientific reality of waters being interconnected, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected solely on the grounds of traditional navigability. In other words, Congress adopted a new view as to the nature of pollution and how to control it at a federal level.

When the House and Senate met in Conference Committee to finalize the 1972 Act, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations.

As discussed in the report of the Conference Committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition. Thus, the new definition read as follows: "The term 'navigable waters' means waters of the United States, including the territorial seas." S. Rep. No. 92-1236, at 144 (1971). The Conference report adopted the precise terminology of the earlier House Public Works Committee report to confirm that the term "must be given the broadest constitutional interpretation," and proclaimed that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes." *Id.*

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent that the law be given broad application. Representative Dingell, who reported the conference committee bill to the House, explained the definition in his statement:

> [The] conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case (77 U.S. 557, 563) – to include waterways which would be "susceptible of being used *** with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera [citing cases]. . . .
>
> [T]his new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as

> determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

118 Cong. Rec. 33,756-57 (Oct. 4, 1972).

Particular attention should be paid to Representative Dingell's pivotal opening sentence of the passage, which set the context for the rest of the explanation. He said that "the conference bill defines the term 'navigable waters' broadly for *water quality* purposes." *Id.* (emphasis added). This opening sentence indicates that the new definition should be interpreted "broadly," but more important is the related reasoning. Representative Dingell signaled that the purpose of the bill's expanded jurisdictional definition was to protect water quality as an independent value, and not merely "navigation" or "navigability" as one of the many possible impacts of water pollution on interstate commerce.

The manner in which both the Senate and House committees defined this overriding objective belies any possibility that Congress intended to focus narrowly on navigable waters, as opposed to *all* "waters of the United States" that might affect the ecosystem integrity objective of the law. The 1972 Senate Report, for example, confirms the intent to restore entire aquatic ecosystems to as close as possible to their natural state:

> Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original. . . .

> In those water bodies which are not pristine, it should be the national policy to take those steps which will result in change towards that pristine state in which the physical, chemical and biological integrity of the water body can be said to exist . . . an objective which minimizes the burden to man in maintaining a healthy environment, and which will provide for *a stable biosphere that is essential to the well-being of human society.*

S. Rep. No. 92-414, at 76 (1972) (emphasis added); see also H.R. Rep. No. 92-911, at 76-77 (1972) (discussing the goal of the legislation as preserving natural ecosystem structure and function).

Because aquatic ecosystems are comprised of intricately connected hydrological systems, the legislative history further reflects Congress' understanding that even traditionally navigable waters could be protected only if the aquatic ecosystem as a whole was protected. In explaining the related definition of "discharge of a pollutant," 33 U.S.C. § 1362(12), for example, Representative Dingell noted that discharges covered by the Act need not be directly to a waterway if pollutants degraded downstream waters after transport over land. 118 Cong. Rec. 33,758. The 1971 Senate Report articulated a similar concept: "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 (Oct. 28, 1971), at 77. Thus, the legislative history repeatedly clarifies that the Act covers not only traditionally navigable waterways, but smaller streams, all tributaries, and wetlands that form components of and are essential to the "chemical, physical, and biological integrity" of the larger aquatic ecosystem. *E.g.*, 118 Cong. Rec. 33,756-57 (Oct. 4, 1972) (Representative Dingell's statement that the bill applied to "all water bodies, including main streams and their tributaries, for water quality purposes"); 118 Cong. Rec. 40,192 (Representative Dingell's statement regarding the need to preserve wetlands); S. Rep. No. 92-414, *supra*, at 77 (coverage

of "navigable waters, portions thereof, and their tributaries").

In order to accomplish the above-described jurisdictional expansion, Congress deliberately deleted the term "navigable" from its statutory definition of "navigable waters" in the text of the Act. As one scholar has noted, "after 1972, federal courts and legal commentators began to call 'the navigable waters of the United States' the '*traditional* navigable waters of the United States' to clearly distinguish that term from the much more extensive geographic jurisdiction of the FWPCA of 1972." Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands (A Response to the Virginia Albrecht/Stephen Nickelsburg ELR Article, the Fifth Circuit's Decision In re Needham, and to the Supreme Court's Dicta in SWANCC)*, 34 ENVTL. L. RPTR. 10,187 (2004); see, e.g., *Hanson v. United States*, 710 F. Supp. 1105, 1108 (E.D. Tex. 1989); *Bayou Des Familles Development Corp. v. U.S. Corps of Engineers*, 541 F. Supp. 1025, 1036 (E.D. La. 1982); *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957, 960 (E.D. Pa. 1979); *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

B. To Meet the Law's Broad Pollution Prevention and Water Quality Goals, Congress Adopted One Definition of "Waters of the United States" To Govern All of the Act's Programs

Petitioners' suggestion that wetlands such as theirs fall outside of the term "navigable waters" is not only contrary to the letter and history of the CWA, it would frustrate Congress' goals in enacting this comprehensive law by excluding from CWA jurisdiction vast amounts of ecologically valuable wetlands adjacent to the innumerable tributaries not considered traditionally navigable waters. This omission would adversely affect water quality, flood control, and habitat for the traditionally navigable water

bodies lying downstream. It would also improperly narrow other CWA provisions designed to address the full range of water pollution problems identified by Congress, as these other provisions of the law all rely on the same definition waters in CWA § 502(7). These include CWA § 301, the broad prohibition on discharging into waters without a permit, the CWA § 402 permit program, which covers all polluting discharges other than dredged or fill material, and CWA provisions relating to water quality standards (including CWA § 401), oil pollution prevention and cleanup (CWA § 311), and toxic effluent standards and prohibitions (such as CWA § 307). These regulatory programs administered by EPA all use what is essentially the same definition of "waters of the United States" that the Corps has relied on to implement the § 404 dredge and fill permit program. Opinion of Attorney General Benjamin Civiletti, 43 Op. Att'y Gen. 15.[8]

Tying EPA's and Corps' hands so the agencies cannot effectively protect water quality or eliminate discharges at their source is not what Congress intended in 1972 when it enacted its comprehensive, interstate solution for a perceived national crisis concerning water pollution. Indeed, petitioners' narrow interpretation is directly contrary to Congress' express intent that the term "navigable waters"

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[8] "The term 'navigable waters' . . . is a linchpin of the Act . . . , critical not only to the coverage of 404, but also to the coverage of the other pollution control mechanisms established under the Act. . . . Its definition is not specific to 404, but is included among the Act's general provisions. It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether – and to what extent – any particular water body comes within the jurisdictional reach of the federal government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged or fill permits under 404 and a different set for purposes of the other pollution control measures in the Act." 43 Op. Att'y Gen. No. 15, at 5 (Sept. 5, 1979).

be given the "broadest possible constitutional interpretation."

C. The Court Should Not Disregard the Agencies' Definition.

Despite the clear intent of Congress to include adjacent wetlands within the definition of "waters of the United States," Petitioners assert that EPA's and Corps' interpretation raises constitutional concerns and therefore the Court should interpret the statute without reference to the agency's regulation. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172-73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." (citation omitted)).

The agency regulations at issue in this case, however, which are faithful to Congress' intent to protect all navigable waters and all of their tributaries, do not even remotely invoke the outer edge of Congress' power. The agencies argued, and the reviewing courts in these cases agreed, that the waters at issue here are all "adjacent" to traditionally navigable waters or tributaries thereto. Therefore, they are governed by 33 C.F.R. § 328.3(a)(7), which applies to "[w]etlands adjacent to" waters such as tributaries, *id.* § 328.3(a)(5), to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," *id.* § 328.3(a)(1).

Notably, this case does not rely on the regulation at issue in *SWANCC*, 33 C.F.R. § 328.3(a)(3), which governs "[a]ll other waters . . . the use, degradation or destruction

of which could affect interstate or foreign commerce . . . ," *i.e.*, waters which are *not* navigable themselves, tributary to navigable waters, or wetlands adjacent to such waters. While *amici* do not agree with the treatment of this regulation in *SWANCC*, that regulation is not before the Court under the facts of these cases, and its scope and constitutionality is not at issue here.

Instead, because there is a direct connection between adjacent wetlands and traditionally navigable waters evident in both situations, these cases fall within the first category of Congress' authority under the Commerce Clause to "regulate the use of the channels of interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). This power generally "allows Congress to make laws that protect the flow of commerce." *United States v. Deaton*, 332 F.3d 698, 706 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (upholding congressional power to bar racial discrimination in hotels because this discrimination had a "disruptive effect . . . on commercial intercourse") and *United States v. Darby*, 312 U.S. 100, 114-15 (1941) (upholding congressional power to forbid interstate commerce in goods made by child labor because traffic in such goods encourages "competition . . . injurious to the commerce")).

This Court has repeatedly confirmed Congress' power over waters such as those at issue here without limit to waters that are themselves navigable:

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability. . . . is but part of this whole. Flood protection, watershed development, recovery of the costs of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce.

United States v. Appalachian Electric Power Co., 311 U.S. 377, 426-27 (1940); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) ("Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce.") (Rehnquist, J.).

As discussed above, Congress intended that the CWA protect water resources broadly. At a minimum, however, by reducing the input of pollutants into waterways, the Act prevents major blockages or other hazards in or impairments to these waters, such as keeping the Cuyahoga River from catching fire, as it did in 1969, due to "a slick of industrial waste." *SWANCC*, 531 U.S. at 174 (2001) (Stevens, J., dissenting); see also *Kernan v. American Dredging Co.*, 355 U.S. 426, 427 (1958) (detailing the death of a seaman due to the ignition of petroleum pollutants floating on the surface of the Schuylkill River in Philadelphia).

Congress' power to ensure that traditionally navigable waters are free of such hazards cannot mean that it may only restrict discharges of pollutants directly into those waters. Discharges into the tributaries and wetlands adjacent to those tributaries can be just as detrimental. As the Sixth Circuit explained:

> It would, of course, make a mockery of [Congress'] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974); *see also Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("It is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). Accordingly, the regulatory

definition of tributary is broad, as Congress intended, and includes all waterbodies that flow into navigable waters. Cf. *United States v. Gerke*, 412 F.3d 804, 805-06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart.").

With respect to adjacent wetlands in particular, the Corps explained in 1977 that if adjacent wetlands are polluted or otherwise filled so that they are unable to function, that directly impacts the water quality in the entire aquatic system:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines [such as the mean tide line and the ordinary high water mark] . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrological cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark or mean high tide line, will affect the water quality of the other waters within the aquatic system.

42 Fed. Reg. 37,121, 37,128 (July 19, 1977).

Specifically, water quality in traditionally navigable waters is potentially affected by filling or otherwise polluting adjacent wetlands in three possible ways: (1) pollutants enter a wetland and thus the hydrological system and eventually make their way to traditionally navigable waters, polluting them; (2) a filled or polluted wetland is no longer able to remove pollutants from the water that runs through it as it would normally do, which leads to increased pollution in traditionally navigable waters; and (3) a filled wetland no longer slows and retains water and thus scouring occurs leading to increased erosion and pollution in the traditionally navigable waterways. See U.S. EPA, *Functions and Values of Wetlands*

1 (2001), at http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf (describing the primary functions of wetlands as water storage and water filtration); *United States v. Riverside Bayview Homes*, No. 84-701, Brief for the United States at 3 ("many wetlands purify water by holding nutrients and recycling pollutants"); *id.* at 39 n.29 (providing an extensive explanation of pollutant removal potential of wetlands).

As the record makes clear, the three wetlands at issue in the *Rapanos* case have a demonstrated hydrological connection to the navigable waters and could have any of the three impacts on those waters discussed above were they polluted or filled. Accordingly, they clearly fall within Congress' authority under the Commerce Clause.

With respect to the wetlands at issue in *Carabell*, even if one assumes that there is no surface water connection between the wetlands and the ditch they directly abut, that case too raises no significant constitutional questions. The *Carabell* case is, at a minimum, an example of the third category of water quality impacts resulting from filling or otherwise polluting wetlands. The connection identified by the Corps was that if the *Carabell* wetlands were filled, there would be a significant reduction in the retention of the surface water. This in turn would mean increased scouring and erosion and thus eventually increased pollution in the Great Lakes system. Congress' power under the Commerce Clause surely allows it to prevent significant harms of this sort to traditionally navigable waters.

In sum, the regulations at issue do not raise a "close" constitutional question because they cover only wetlands that are connected to traditionally navigable waters. This Court should therefore follow its usual practice under *Chevron* and conclude that, as Congress intended, the statute unambiguously embraces adjacent wetlands within the definition of "waters of the United States."

In the alternative, if the Court finds that the intent of Congress is not clear, it should afford deference to the Corps' inclusion of adjacent wetlands because it is a

reasonable interpretation of the statute, as it did in *Riverside Bayview Homes*. See 474 U.S. at 131-34. Deference to an agency's determination is particularly appropriate when the agency, such as EPA and the Corps here, administers a complex, technical statute. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). These regulations are particularly reasonable in that they do not define the term "waters of the United States" to include each and every possible waterbody of the United States but rather, consistent with the extensive legislative history discussed above, only those waters with an impact on traditionally navigable waters.

Moreover, the inclusion of adjacent wetlands that are separated by barriers from traditionally navigable waters or tributaries to those waters is reasonable in that those wetlands are likely to have at least a groundwater connection to the adjacent waterbody. See National Research Council, *Wetlands, Characteristics and Boundaries* 156 (1995) ("Even water quality functions might not be separate for isolated and other wetlands because of the ground water connections between isolated wetlands and surface waters."); R.W. Tiner, H.C. Bergquist, G.P. DeAlessio and M.J. Starr, *Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States* § 2 (2002), at http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm (even geographically-isolated wetlands can be "connected hydrologically via groundwater connections to other wetlands and to rivers and streams."). In addition, including adjacent wetlands separated by human-made barriers prevents individuals and entities who have constructed or who are tempted to construct barriers or the like between their wetlands and a traditionally navigable water (or a tributary thereto) from evading the Act's requirements. Cf. *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the

scope of the authority delegated to the agency by the statute.").

II. Under the Facts of Both Cases, Affirmance is Warranted Under *United States v. Riverside Bayview Homes*.

A. Both Cases Are on All Fours With *Riverside Bayview*.

In *Riverside Bayview*, this Court upheld the authority of EPA and the Corps to exercise regulatory jurisdiction under the federal CWA over wetlands, like those at issue here, that are "adjacent to" navigable bodies of water, but that are "not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U.S. at 131. The Court also held as a matter of regulatory interpretation that adjacent wetlands do not have to be flooded by surface waters to be included in the regulatory definition of wetlands. *Id.* at 129-31. Although these areas were not connected to traditionally navigable waters via surface hydrology, the District Court found that the soils supported wetland "vegetation that requires saturated soils for growth and reproduction," that the soils were saturated due to ground water, and that "the wetland was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [the] property to Black Creek, a navigable waterway." *Id.* at 130-31. Notably, the District Court did not expressly find a hydrological connection between the waters of either Black Creek or Lake St. Clair and the ground water responsible for soil saturation on the property in question.

The Court in *Riverside Bayview* declined to address, as unnecessary to its decision in the case, whether the Act covers "isolated" as well as adjacent wetlands. *Id.* at 131 n.8. That distinction set the stage for the decision in *SWANCC*, which answered the question in the negative as

regards intrastate, isolated ponds connected only by migratory bird use. In *SWANCC*, however, this Court did not disturb the fundamental holding in *Riverside Bayview* that any waters that are adjacent to navigable waters remain subject to CWA jurisdiction. *See SWANCC*, 531 U.S. at 167 (reiterating holding of *Riverside Bayview* as "the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway").

The wetlands at issue in both *Rapanos* and *Carabell* are not like the "isolated" ponds in *SWANCC* but rather are almost identical to the wetlands at issue in *Riverside Bayview*. They all directly abut a tributary that feeds into navigable waters and as such, have direct and tremendous impacts on those waters. Because this Court upheld the regulations in circumstances very similar to these, there is no reason to change course.

B. The History of the 1977 Amendments Relied on in *Riverside Bayview* Further Supports Affirmance.

When drawing a parallel to *Riverside Bayview* in these cases, it is important that the Court acknowledge, as it did in *Riverside Bayview*, Congress' actions and statements indicating that it clearly intended the phrase "navigable waters" to include wetlands, without regard to artificial geographic limitations, when passing the 1977 amendments. See *Riverside Bayview*, 474 U.S. at 137 ("Although we are chary of attributing significance to Congress' failure to act a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."); cf. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (relying on 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

In 1977, the regulatory battle over the jurisdiction of the Act[9] was reflected by two competing approaches to amending the 404 program considered by Congress. As it had in 1972, the broader approach won out.

The first approach was that taken in the bill reported out of the Senate Environment and Public Works Committee, which sought to address various concerns regarding the implementation of the 404 program, especially workload issues. Most importantly the Committee made clear that "[t]he committee amendment is designed to reaffirm this intent and dispel the widespread fears that the program is regulating activities that were not intended to be regulated." S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977), at 74-75.

In response, during the Senate's floor debate on the 1977 amendments, Senator Lloyd Bentsen of Texas offered an amendment to the Environment and Public Works Committee's bill that would have amended the Act to limit the scope of § 404 to only traditionally navigable waters and their adjacent wetlands. The Congressional Record contains a long debate held before the full Senate voted on the Bentsen plan to narrow the scope of the CWA protections for wetlands and other waters from discharges of dredge and fill material. It is clear from the debate that all agreed that the scope of the Act since 1972 had reached all waters of the United States, and that bill as proposed would not reduce that scope of protection.

As Senator Bentsen himself stated: "The committee has failed to recommend any reduction in the scope of the § 404 permit program. . . . The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 Cong. Rec. 26,711 (Aug. 4, 1977). In supporting this

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[9] See generally Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N. D. L. REV. 873, 886-905 (1993).

amendment, Senator John Tower of Texas referred to *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) – in which NRDC argued and the district court agreed that the Corps' cramped reading of "navigable waters" was a failure to implement the full statutory mandate of the CWA – when he stated: "A court decision, coupled with an administrative decision, is causing us to be faced with a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States." 123 Cong. Rec. 26,721-22 (Aug. 4, 1977).

Opponents of Senator Bentsen's amendment readily acknowledged that the Environment and Public Works Committee's bill maintained the broad jurisdiction enacted in 1972, and argued why Senator Bentsen's amendment to reduce jurisdiction of the Act should be rejected. In particular, Senator Gary Hart of Colorado spoke at length on the shortcomings of the approach advocated by Senator Bentsen:

> The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect all of the elements of those systems, which will not permit dredge and fill activities to deposit very toxic materials into those waterways.

123 Cong. Rec. 26,713 (Aug. 4, 1977). Likewise, Senator John H. Chafee of Rhode Island spoke passionately about the value of wetlands for the whole country and why Senator Bentsen's proposal for eliminating broad federal protection for intrastate waters should be rejected:

> I think it is important to bear in mind that marshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States. The wetlands perform a vital part of the food chain for our wildlife. . . . I should like to stress that these wetlands are not something that belong to Louisiana or Rhode Island or Michigan or Minnesota. They belong to all the citizens. They are much too valuable to be abandoned to some unstable, fragmentary kind of protection. We must bear in mind that these wetlands are part of this larger system. They are not independent. They do not belong only to Minnesota, so that if Minnesota wants to fill them in, it is too bad for the Nation. We have to remember that it affects everything else downstream. There is a linkage between wetlands and streams and estuaries and rivers, and they all must live in harmony, through wise management.

123 Cong. Rec. 26,716-17 (Aug. 4, 1977). Finally, Senator Howard Baker of Tennessee argued that both the Environment and Public Works Committee and courts recognized and were effectuating the common scientific understanding of hydrological linkage between all types of waters:

> Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges. . . . It is important to understand that toxic substances threaten the aquatic environment when discharged into small

> streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks. . . . Continuation of the comprehensive coverage of this program is essential for the protection for the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added). Senator Bentsen's amendment was ultimately defeated by a vote of the full Senate.

The fact that a later Congress debated the value of wetlands when determining the scope of its jurisdiction with respect to an earlier enactment should be afforded "persuasive value" because "[h]ere we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean." *Bell v. New Jersey*, 461 U.S. 773, 784-785 & n.12 (1983) (quoting *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975)). Various Members' remarks praising the valuable biological and hydrologic contributions of wetlands, particularly when made during debate over geographic jurisdiction, thus cannot be squared with artificial geographic limits suggested by Petitioners.

In addition to the clear statements of Congress describing the broad jurisdiction of the Act, Representative Don H. Clausen of California referred in his comments to a Library of Congress publication entitled "Case Law Under the Federal Water Pollution Control Act Amendments of

1972." 123 Cong. Rec. 38,976 (Dec. 15, 1977). This document discusses *NRDC v. Callaway* and other cases reaching similar conclusions on the scope of Section 404. As this Court has recognized when considering a different section of the CWA, Representative Clausen's statement and the Library of Congress litigation summary to which he referred demonstrate Congressional awareness that it was rejecting an effort to legislatively overrule that case law interpreting Congressional intent reflecting a very broad jurisdiction of the CWA. See *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 128 & n.17 (1985).

Finally, Congressional support for broad geographic jurisdiction is reflected in one of the amendments to Section 404 that Congress did pass in 1977. The addition of subsection (g) to Section 404 thoroughly repudiates any limitation of the Section to traditionally navigable waters as the Petitioners would assert. Section 404(g) provides for state assumption of the Section 404 program under certain conditions. However, Section 404(g)(1) expressly excludes state assumption of jurisdiction over traditionally navigable and tidal waters, "including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). Had Congress intended to limit Section 404 to traditionally navigable waters in the first place, this later addition of an option for state assumption of regulation over all other areas would be meaningless because there would be nothing to assume. Section 404's geographic scope therefore must be construed to avoid rendering Section 404(g) meaningless or superfluous.

CONCLUSION

The judgment of the Court of Appeals in both cases should be affirmed.

Respectfully submitted,

KIM DIANA CONNOLLY
UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW
Main & Greene Streets
Coumbia, SC 29208
(803) 777-6880

ROBERT W. ADLER
AMY J. WILDERMUTH*
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 581-6833

Counsel for Amicus Curiae

**Counsel of Record*

(33) (29)

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In The
Supreme Court of the United States

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent,

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE DUCKS UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, AMERICAN FISHERIES SOCIETY, AMERICAN SPORTFISHING ASSOCIATION, BASS PRO SHOPS, BOONE & CROCKETT CLUB, IZAAK WALTON LEAGUE OF AMERICA, MICHIGAN UNITED CONSERVATION CLUBS, THE ORVIS COMPANY, INC., PHEASANTS FOREVER, THEODORE ROOSEVELT CONSERVATION PARTNERSHIP, TROUT UNLIMITED, WILDLIFE MANAGEMENT INSTITUTE, AND THE WILDLIFE SOCIETY IN SUPPORT OF RESPONDENTS

JAMES MURPHY
NATIONAL WILDLIFE FEDERATION
58 State Street
Montpelier, Vermont 05602
(802) 229-0650
Counsel of Record for Amici Curiae

THOMAS M. FRANCE
NATIONAL WILDLIFE FEDERATION
240 North Higgins
Missoula, Montana 59802
(406) 721-6705
Counsel for National Wildlife Federation

NEIL S. KAGAN
NATIONAL WILDLIFE FEDERATION
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
(734) 769-3351
Senior Counsel for National Wildlife Federation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST

Amici are organizations that represent members who comprise a substantial number of America's anglers, hunters, and conservationists; businesses that rely on hunters and anglers as customers; organizations that represent professionals who manage fisheries, wildlife and water resources; and organizations that represent wildlife and fisheries scientists.[1] All of amici have a strong and demonstrated interest in continued water resources' protection. Some amici have developed expertise on the Clean Water Act through education and conservation efforts to protect water resources and wildlife dependent on water resources dating back to the Act's passage in 1972; others rely on healthy water resources to support their angling and hunting related businesses; others are concerned with water and wetland restoration and preservation efforts; still others represent a broad diversity of professionals devoted to fish and wildlife conservation.

SUMMARY OF THE ARGUMENT

Protecting fish, shellfish, wildlife and recreational opportunities is a central goal of the Clean Water Act (CWA or Act). The Court has recognized that in passing the Act Congress explicitly intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by ensuring that pollution is controlled at its source and by protecting the important ecological habitat functions of aquatic systems. To achieve its goal, Congress recognized the necessity of broadly applying the Act's comprehensive protections to "waters of the United States."

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[1] Pursuant to S.Ct.R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

These cases concern water resources essential for fish and wildlife to thrive throughout the interconnected waters of aquatic systems: tributaries, such as headwater streams that include the ditch tributaries at issue in these cases, and wetlands adjacent to tributaries. Tributaries and adjacent wetlands are inseparably bound to navigable-in-fact waters[2] like trees are to their roots. If the roots of a tree are poisoned and destroyed, the tree dies. Similarly, if tributaries and adjacent wetlands are poisoned and destroyed, connected navigable-in-fact waters are made lifeless and polluted.

This brief will demonstrate the importance of tributaries and adjacent wetlands to the maintenance and protection of "the biological integrity of the nation's Waters," *i.e.*, the wildlife and aquatic life throughout aquatic systems. Not only is the protection of such resources reasonable under the Act, but necessary and intended by Congress. This brief will further show that the multi-billion dollar a year economic activity generated by hunting, fishing and wildlife-related activity depends on the protection of these resources and would be substantially affected by their degradation and destruction. Consequently, the protection of such waters was a valid exercise of Congress's commerce clause power.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that the Migratory Bird Rule cannot be the sole basis for asserting jurisdiction over ponds that had formed in abandoned sand and gravel pits. In these cases, Petitioners attempt to contort the Court's narrow holding in *SWANCC* to mean that the significant

---

[2] Waters are navigable-in-fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

ecological and hydrological connections between tributaries and adjacent wetlands and navigable-in-fact waters also cannot serve as a basis for asserting jurisdiction over such waters. Petitioners would have the Court rewrite the Act to allow for not only the unregulated fill of these waters, and the resulting loss of their essential life-giving functions, but also the discharge of all other pollutants into countless tributaries and adjacent wetlands, many of which flow directly into navigable-in-fact waters. Such a ruling would be contrary to the Act and the Court's precedent.

Only a generation ago, our nation faced a crisis of unrestrained pollution that left many of our waters dead or degraded, poisoning the habitat upon which our fish and wildlife depend. Understanding the need to broadly restore and maintain the health of these aquatic systems, Congress acted by adopting the Clean Water Act. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *see also, Int'l Paper v. Ouelette*, 479 U.S. 481, 492, 486 n.6 (1987) (where the Court held that the Act was designed to establish "an all-encompassing program of water pollution regulation" and "applies to all point sources and virtually all bodies of water," and that "navigable waters" has been construed "expansively") (citations omitted). The Court should follow the precedent it set in *Riverside Bayview* by re-affirming that the Act provides broad protection and rejecting the Petitioners' attempt to undo the law Congress designed to restore and maintain America's most precious natural resource, its water.

ARGUMENT

Despite its many complexities, the heart of the Act is quite simple. Section 301(a) prohibits the discharge of pollutants, including dredged and fill material, into "navigable waters" defined broadly as "waters of the United States." 33 U.S.C. §§ 1311(a) and 1362(7). Regulatory definitions for "waters of the United States" include

tributaries of navigable waters, *see* 33 C.F.R. § 328.3(5), and wetlands adjacent[3] to other jurisdictional waters, including tributaries. *See id.* § 328.3(7). The Act, however, allows for certain discharges to be authorized subject to permits. 33 U.S.C. §§ 1311(a), 1342 and 1344. The discharge of most pollutants, such as sewage waste, toxic materials, and industrial waste into jurisdictional waters is governed under Section 402. *Id.* § 1342. The discharge of dredged and fill material into jurisdictional waters is governed under Section 404. *Id.* § 1344. Section 301 established no jurisdictional distinction between an activity involving a discharge of fill and an activity involving a discharge of other pollutants. This principle of the Act must be borne in mind in resolving the jurisdictional question posed by these cases.

Congress passed the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of its goals is to protect and propagate fish, shellfish, wildlife and water-related recreation. *See id.* § 1251(a)(2). The Court has previously concluded that:

> Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

Riverside Bayview, 474 U.S. at 132-33 (quoting S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

---

[3] The regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). Moreover, the regulations state that adjacent wetlands include "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.*

In *Riverside Bayview*, the Court addressed the question whether the Corps' regulation of "wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" was reasonable under the Act. *Id.* at 131. The Court found that "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment" and held that the regulation of such wetlands was therefore permissible. *Id.* at 131-35.[4] The Court noted wetlands' ability to "filter and purify water draining into adjacent bodies of water, . . . to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion," and to "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species" as reasons for upholding protection of adjacent wetlands under the Act. *Id.* at 134-35 (citations omitted). Moreover, the Court did not require each adjacent wetland to be hydrologically linked to its neighboring water, instead finding that the Corps' assertion of jurisdiction was reasonable over this class of waters that *"tend[s]* to drain" into abutting jurisdictional waters. *See id.* at 134 (emphasis supplied).[5]

---

[4] Petitioners and Amici in support of Petitioners argue that the Court only intended the holding in *Riverside Bayview* to extend to wetlands directly abutting navigable-in-fact waters and rely heavily on the Court's occasional use of the term "open water" to support that argument. *See, e.g.*, Pet. Rapanos et al. Br. at 14. However, the Court instead announced that its ruling applied more broadly to wetlands adjacent to "streams" and "other bodies of waters" that are otherwise jurisdictional under the Act. *See Riverside Bayview*, 474 U.S. at 135. It was only the regulation of non-adjacent wetlands that the Court did not address in *Riverside Bayview*. *See id.* at 131 n.8.

[5] In fact, Justice Stevens, who took part in the 9-0 decision in *Riverside Bayview*, stated that the wetland at issue in that case was not "hydrologically connected to navigable water." SWANCC, 531 U.S. at

(Continued on following page)

The same factors present in *Riverside Bayview*, and the same rationale the Court applied in rendering that decision, are present and apply here, providing ample bases for the Court to uphold the Corps' assertion of jurisdiction over all the adjacent wetlands at issue in these cases.

Tributaries and adjacent wetlands are inseparably bound to navigable-in-fact waters. First, most of them drain or tend to drain into navigable-in-fact waters, meaning that they are capable of carrying pollutants downstream and poisoning navigable-in-fact waters. Additionally, tributaries and adjacent wetlands maintain and protect the integrity of navigable-in-fact waters because they control flooding, cleanse and retain pollutants, regulate flow, and provide habitat for species, including many fish and amphibian species that depend for their survival on movement between navigable-in-fact waters and smaller connected streams and wetlands.

Consequently, the protection of tributaries and adjacent waters is no less essential for maintaining the integrity of navigable-in-fact waters than the protection of navigable-in-fact waters themselves. Absent such protection, fish and other wildlife populations will inevitably decline. Such a decline will substantially harm wildlife-dependent economic activities, such as hunting and fishing. The regulation of activities affecting tributaries and adjacent wetlands does not pose a significant constitutional question, in part, because unfettered economic and other activities that would destroy these resources would have a substantial adverse effect on the multi-billion dollar interstate commercial activities of hunting and fishing.

175-76 (Stevens, J., dissenting (discussing the facts of *Riverside Bayview*)).

I. PROTECTION OF TRIBUTARIES AND ADJACENT WETLANDS IS ESSENTIAL TO THE INTEGRITY OF OUR NATION'S WATERS, AND TO THE VITALITY OF HUNTING AND FISHING IN THE UNITED STATES.

A. The Health of Aquatic Life and Other Wildlife, Including Many Game Species, Requires Protection of Tributaries and Adjacent Wetlands.

Overview of Tributaries and Adjacent Wetlands.

Often located miles from navigable-in-fact waters, tributaries and adjacent wetlands provide much of the habitat needed by fish and wildlife, and are the source of most of the water that flows through the Nation's waterways. Small headwater streams (known as first, second, or low order streams),[6] represent about three-fourths of the total length of all streams in the United States.[7] Moreover, tributaries include many higher order streams that may not themselves be navigable. In addition, many low order streams flow directly into larger waters without first joining any other tributaries.[8]

Wetlands adjacent to tributaries are usually hydrologically and ecologically linked to their nearby tributaries. These adjacent wetlands perform immensely important water quality functions for navigable-in-fact

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[6] Higher order streams are formed by the confluence of lower order streams. Navigable-in-fact streams tend to be higher order streams. *See* Meyer, J. L. et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, American Rivers and Sierra Club, publishers, 6 (Sept. 2003), *available at* http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182 (*Where Rivers Are Born*).

[7] *Id.*

[8] *See id.*

waters. For instance, in four Vermont watersheds, headwater wetlands comprise forty-five percent of the wetlands that improve water quality in larger downstream waters.[9] Wetlands associated with first order streams alone account for ninety percent of phosphorous removal for eight northeastern watersheds.[10] Absent these wetlands, much of this retained pollution would reach navigable-in-fact waters.

Many tributaries can be characterized as "ditches," because they are either channelized natural streams, or channels dug through wetlands to increase their drainage to other waters.[11] In addition, wetlands and abutting waters are often connected to navigable-in-fact waters via seepage through a berm, subsurface flow under a berm, or berm failures arising from erosion, cuts or overtopping.[12]

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[9] *Id.* at 14.

[10] *Id.*

[11] *See* TINER, R.W., IN SEARCH OF SWAMPLAND: A WETLAND SOURCEBOOK AND FIELD GUIDE 118 (Rutgers U. Press, New Brunswick, NJ, and London 2005) (IN SEARCH OF SWAMPLAND) (channelization of most streams designed to increase drainage and resulting levees can alter adjacent wetland hydrology); Ohio Environmental Protection Agency, *Technical Report: Ohio's Primary Headwater Streams – Fish and Amphibian Assemblages*, 3 (Sept. 2002), *available at* http://www.epa.state.oh.us/dsw/wqs/headwaters/TechRep_FishAmphibian_2002.pdf (*Ohio's Primary Headwater Streams*) (stating that a growing percentage of headwaters streams in Ohio have been modified by channelization, drainage and other alterations); National Research Council, Committee on Restoration of Aquatic Ecosystems, *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy*, National Academy Press, 33 (1992) (citing a Council of Environmental Quality finding that forty-one percent of perennial streams are affected by siltation, bank erosion, and channelization).

[12] *See, e.g.*, U.S. Army Corps of Engineers, *Digest of Water Resources, Policies, and Authorities*, EP, 1165-2-1, 13-12 (July 30, 1999), *available at* http://www.wbdg.org/ccb/ARMYCOE/COEPAM/1165_2_1.pdf (stating that levees fail due to overtopping, surface erosion, internal erosion, underseepage and slides within the levee embankment or foundation soils).

Thus, most ditches, levees and berms are simply man-made alterations of natural features with a historic connectivity between waters. This is particularly true in the Midwest, where vast numbers of streams and wetlands have been "ditched," otherwise altered or destroyed.[13] Similar to natural streams, ditches can provide significant hydrological and ecological connections to navigable-in-fact waters that affect the integrity of those waters.

In *Riverside Bayview*, the Court stated that "wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species.'" *Riverside*, 474 U.S. at 134-35 (citing 33 C.F.R § 320.4(b)(2)(i)). The scientific evidence supports the Court, showing that adjacent wetlands, along with tributaries, are essential for the health and survival of myriad species dependent on and associated with aquatic systems.

1. Storing Water and Maintaining Stream and River Flows.

Tributaries and adjacent wetlands, including those without direct or continuous surface flow into other waters, ensure proper and healthy flow in all waters by temporarily storing much of the water that enters aquatic systems. By retaining water during rain and snow melt events, these tributaries and adjacent wetlands ensure

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[13] *See, e.g.*, Great Lakes Regional Collaboration, *Great Lakes Regional Collaboration Strategy: To Restore and Protect the Great Lakes*, 11 (Dec. 2005), *available at* http://www.glrc.us/documents/GLRC_Strategy.pdf (tributaries essential to fish survival in the Great Lakes negatively altered); IN SEARCH OF SWAMPLAND, at 110, 113 tbl.8.3, 118 (describing wetlands losses in the Midwest due to drainage and other activities and stating that Michigan lost approximately 5.6 million acres of its wetlands from the 1700s to the 1980s).

that water more evenly and slowly flows into downstream waters.[14] This prevents washouts, maintaining the structural nooks and crannies important to the reproduction of certain fish.[15]

Streams dry up and often warm during low flow periods.[16] Tributaries and adjacent wetlands recharge groundwater, maintaining the healthy downstream flows and temperatures that fish and other wildlife depend on during these dry periods. For instance, fens – wetlands that occur where groundwater continuously seeps upward through the root zone of vegetation – provide colder subsurface flow that maintains trout streams by allowing sufficiently cool flows in warmer months.[17] Forested wetlands also provide both water and cooling shade for adjacent streams.[18] By contrast, when streams and wetlands are destroyed, streams throughout the aquatic system experience increased flooding due to the loss of water retention upstream.[19]

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[14] *See, e.g.*, IN SEARCH OF SWAMPLAND at 93 tbl.7.1, 95-6; *Where Rivers Are Born* at 10.

[15] *See, e.g.*, Shellberg, J., Center for Watershed Studies, University of Washington, *Fact Sheet: Bull Trout in western Washington* (Jan. 2002), *available at* http://depts.washington.edu/cwws/Outreach/FactSheets/bulltrout.pdf (*Fact Sheet: Bull Trout in western Washington*) (stating that bull trout fry "are highly associated with the substrate of streambeds and are known to utilize interstitial spaces as cover" and "bull trout eggs pockets [are] highly susceptible to . . . flood events").

[16] *See, e.g., Where Rivers Are Born* at 11; IN SEARCH OF SWAMPLAND at 124 (describing how water withdrawals from and adjacent to Ipswich River (MA) wetlands have caused the river to run dry during summer).

[17] *See Where Rivers Are Born* at 20.

[18] IN SEARCH OF SWAMPLAND at 94.

[19] *See, e.g., Where Rivers Are Born* at 10-11.

2. Trapping Sediment.

Adjacent wetlands and tributaries trap enormous amounts of sediment. Where they are not destroyed or degraded, these waters can trap most sediment before it reaches navigable-in-fact waters.[20] This provides important biological and water quality benefits, such as clearer water, which supports vegetation and fish reproduction.[21] When sediment washes downstream, it can fill in habitat areas and smother the fry and eggs that live there.[22] Excess sediment can also harm the reproduction and diversity of fish and other species, such as macroinvertebrates that serve as the foundation for the food chain of the entire aquatic habitat.[23]

3. Storing and Recycling Nutrients; Providing Food and Oxygen.

Tributaries and adjacent wetlands store and beneficially recycle nutrients, preventing unnaturally high levels of nutrients (such as phosphorous and nitrogen) which exacerbate harmful plant and algal growth in downstream waters, a process called eutrophication.[24] Eutrophication

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[20] *See id.* at 12-13 (describing sediment retention functions of wetlands); IN SEARCH OF SWAMPLAND at 95 (same); *see also* Gomi, T. et al., *Understanding Processes and Downstream Linkages of Headwater Systems*, 52 BioScience 905-916, 906 (2002), *available at* http://www.scs.dpri.kyoto-u.ac.jp/users/sidle/papersPDF/02_Article_Gomi_(SP63).pdf (stating that large substrate and woody debris in small headwater streams provide sediment storage sites).

[21] *See Where Rivers Are Born* at 12.

[22] *See, e.g., id.*

[23] *See id.*; U.S. Environmental Protection Agency, *Aquatic Biodiversity*, *available at* http://www.epa.gov/bioindicators/aquatic/sediment.html (last visited Jan. 6, 2006) (stating that sediment in waters can "cover[ ] important spawning habitats of fish and other organisms").

[24] *See* Peterson, B.J. et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 Science 86-90, 88 (2001), *available at* http://www.k-state.edu/doddslab/journalarts/peterson%20et%20al.%20science%202001.pdf

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causes algal blooms, which clouds water bodies, removes oxygen vital to fish, and often results in fish kills.[25]

In one study, 64% of inorganic nitrogen entering a small stream is retained or transformed within 1000 yards.[26] In another telling example, a wetland receiving discharges of treated sewage each day removes 4.9 tons of phosphorous, 4.3 tons of ammonia, and 138 pounds of nitrate, while adding 20 tons of life-providing oxygen to water that would otherwise carry these pollutants into a tributary of the Delaware River, and, likely, the river itself, seriously harming both water quality and wildlife in downstream waters.[27] Additionally, streamside wetlands in southern New England have been found to remove more than eighty percent of the nitrate from water, and forested wetlands have been shown to be particularly effective at maintaining and restoring water quality, with their trees storing heavy metals that would otherwise likely drain into nearby waters.[28]

Tributaries and adjacent wetlands also facilitate the processing of nutrients in ways that maintain wildlife. Detritus and other biological materials are processed by these waters into compounds edible by macroinvertebrates

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(finding smaller streams may be the "most important in regulating water chemistry in large drainages because their large surface-to-volume ratios favor rapid [nitrogen] uptake and processing"); Alexander, R.B. et al., *Effect of stream channel size on the delivery of nitrogen to the Gulf of Mexico*, 403 Nature 758-761 (2000), *available at* http://water.usgs.gov/nawqa/sparrow/nature/nature_alexetal-2.pdf (concluding that nitrogen-loss rates decline rapidly with stream channel size, and declines of nitrogen removal in small streams are an important contributor to eutrophication in the Gulf of Mexico).

[25] *Where Rivers Are Born* at 13.

[26] *Id.* at 14.

[27] *See* IN SEARCH OF SWAMPLAND at 94-5. Vegetation in wetlands provides life-giving oxygen to waters. *Id.* at 85.

[28] *See id.* at 93-94.

which are, in turn, important food sources for fish, frogs, and other wildlife.[29]

4. Allowing Completion of Life Cycles.

Many aquatic and semi-aquatic species begin their lives and return to spawn or breed in tributaries and adjacent wetlands. Species of salmon and trout use tributaries both to spawn and during their juvenile life stages.[30] Several Great Lakes species, such as chain pickerel, largemouth bass, smallmouth bass, carp, northern pike, and muskellunge, rely on inland wetlands for spawning and juvenile life stages.[31] Moreover, wetlands are vital to three-fourths of America's commercial fish production, which is worth about $111 billion.[32] Thus, tributaries and adjacent wetlands serve as nurseries where fry are able to feed and grow with shelter from predators until they are mature enough to survive in larger waters. The impacts of degraded water quality, hydrologic alteration, thermal modification, and loss of stream and wetland habitat on fish species are self-evident and well supported by the scientific literature.

Additionally, given their unique breeding, feeding and wintering requirements, many amphibians depend on

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[29] *See Where Rivers Are Born* at 14-15; IN SEARCH OF SWAMPLAND at 97.

[30] *See, e.g.*, Bettelheim, M., State of California Dep't of Fish and Game, *An Evaluation of Big Chico Creek, Lindo Channel, and Mud Creek as Salmonid Nonnatal Rearing Habitats*, 7-8, 12 (Aug. 2001), *available at* http://www.atlantismagazine.com/bettelheim/bigchico.pdf (describing salmonid breeding habitat and stating that "Chinook [salmon] and steelhead [trout] regularly utilize tributaries within the Big Chico Creek watershed"); *Fact Sheet: Bull Trout in western Washington* (spawning and early rearing of bull trout occurs in coldwater streams, with migration to mainstem rivers, lakes, and saltwater).

[31] *See* IN SEARCH OF SWAMPLAND at 85, 86 fig.6.3.

[32] *Id.* at 101.

movement from wetlands to nearby streams, lakes and rivers.[33] For amphibians, successful breeding and survival is oftentimes dependent on the *lack* of a direct surface connection between nearby waters. For instance, many amphibians, such as the Northern Leopard Frog which is native to the Great Lakes, find particularly successful breeding opportunities in wetlands where predacious fish are prevented access from adjacent waters.[34] Later, many of these amphibians move to nearby tributaries and other waters to feed and overwinter in deeper waters that will

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[33] *See, e.g.*, Smith, B., U.S. Dep't of Agriculture, Forest Service, *Conservation Assessment for the Northern Leopard Frog in the Black Hills National Forest South Dakota and Wyoming*, 6-12, 13 (April 2003), *available at* http://maps.wildrockies.org/ecosystem_defense/Science_Documents/Smith_2003.pdf (*Conservation Assessment for the Northern Leopard Frog in the Black Hills National Forest*) (describing movement pattern of northern leopard frogs from breeding wetland areas to nearby lakes, rivers and streams for feeding and overwintering); *Ohio's Primary Headwater Streams*, at 17-19 tbl.5 (listing salamander species that use small headwater streams, some directly associated with wetlands, for breeding. Also shows that certain salamander species migrate from such waters to higher order streams); Maxwell, B., *Management of Montana's Amphibians: A Review of Factors that may Present a Risk to Population Viability and Accounts on the Identification, Distribution, Taxonomy, Habitat Use, Natural History and the Status and Conservation of Individual Species*, Report No. 43-0343-0-2224 to the USDA Forest Service, 9 (Sept. 2000), *available at* http://www.isu.edu/~petechar/iparc/Maxell_Mgmnt.pdf (*Management of Montana's Amphibians*) (describing amphibians need for a complex set of connected habitats for breeding, foraging and overwintering).

[34] *See, e.g.*, *Conservation Assessment for the Northern Leopard Frog in the Black Hills National Forest* at 36 (waters that do not have direct connections with waters containing predacious fish are "excellent sites in which to promote the growth of vigorous populations of northern leopard frogs"); U. S. Geological Survey, *Northeast Amphibian Research and Monitoring Initiative*, *available at* http://pwrc.usgs.gov/nearmi/species/ (last modified Aug. 5, 2005) (last visited Jan. 6, 2006) (some frogs and toads "require fishless temporary ponds" for successful reproduction).

not freeze.[35] Due in large part to their movement between nearby waters, amphibians are an important link in the ecosystem's food chain and serve as a food source for fish and other aquatic wildlife.[36]

Moreover, invertebrates such as stoneflies and mayflies, which many game fish rely on for food, often originate in fishless upstream waters and drift downstream.[37] A recent report found that forested, fishless headwaters in Alaska provide abundant food sources for downstream salmon.[38]

Waterfowl also depend on tributaries and adjacent wetlands, such as Michigan's valuable duck population. An average of approximately 819,000 breeding ducks has been counted in Michigan annually since 1992, including about 415,000 mallards.[39] This also includes blue-winged teal,

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[35] *See, e.g., Conservation Assessment for the Northern Leopard Frog in the Black Hills National Forest* at 11-12; *Management of Montana's Amphibians* at 9.

[36] *See, e.g., Conservation Assessment for the Northern Leopard Frog in the Black Hills National Forest* at 11-12, 19-21 (stating that northern leopard frogs are a food source for a variety of fish and other wildlife); *Management of Montana's Amphibians* at 8 (amphibians are key links in the aquatic and terrestrial food webs).

[37] *See Where Rivers Are Born* at 15; Wipfli, M.S, and D.P. Gregovich, *Export of invertebrates and detritus from fishless headwater streams in southeastern Alaska: implication for downstream salmonid production*, 47 Freshwater Biology 957-69 (2002), *available at* http://www.troutnut.com/pdfarchive/wipfli.pdf (*Export of invertebrates and detritus from fishless headwater streams in southeastern Alaska*) (finding that forested headwaters provide a year round source of invertebrates and detritus for downstream habitats).

[38] *See Export of invertebrates and detritus from fishless headwater streams in southeastern Alaska.*

[39] *See* U.S. Fish and Wildlife Service, *Waterfowl: Population Status, 2005*, 52 (July 2005), *available at* http://www.fws.gov/migratorybirds/reports/status05/final_status_05.pdf.

green-winged teal, hooded mergansers, black ducks, ring-necked ducks and several other species of ducks which are dependent upon the state's waters and wetlands.[40]

Two of the most economically-important ducks in the U.S. are the mallard and wood duck, comprising 36.8% and 9%, respectively, of the nation's 2004 harvest.[41] These two species are highly adapted to forested wetlands, such as the type at issue in the Carabell case. The wood duck's habitat requirements restrict its primary distribution to wooded wetlands.[42] A leading study stated that "in general, wood ducks use the wetlands associated with streams and rivers more than any other habitat type," and explicitly included "sluggish ditches" within the description of wood duck habitats.[43] The study further noted that ponds and wetlands near, but separate from, channels had added value to the species, particularly as breeding habitat.[44] Thus, wetlands and tributaries precisely like the ones in question in these two cases are critical to maintaining this important species.

To sum up, tributaries and adjacent wetlands are of enormous importance to the chemical, physical, and biological integrity of navigable-in-fact waters, and "inseparably bound up" with them in numerous and significant ways. As

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[40] Michigan Dep't of Natural Resources, *Landowner's Guide: Waterfowl*, *available at* http://www.michigandnr.com/publications/pdfs/huntingwildlifehabitat/Landowners_Guide/Species_Mgmt/Waterfowl.htm (last revised Dec. 12, 1999) (last visited Jan. 4, 2006).

[41] Richkus, K. et al., U.S. Fish and Wildlife Service, *Migratory Bird Harvest Information, 2004, Preliminary Estimates*, 27 (2005), *available at* http://www.fws.gov/migratorybirds/reports/whs/Migratory%20Bird%20Harvest%20Information,%202004%20Preliminary%20Estimates.pdf.

[42] FREDRICKSON, L. AND D. BATEMA, GREENTREE RESERVOIR MANAGEMENT HANDBOOK 68 (Univ. of Missouri-Columbia 1992).

[43] BELLROSE, F. AND D. HOLM, ECOLOGY AND MANAGEMENT OF THE WOOD DUCK 41 (Stackpole Books, Mechanicsburg, PA 1994).

[44] *See id.*

such, the Clean Water Act must necessarily continue to be interpreted to protect such waters.

B. Hunting and Fishing are Substantial Recreational and Economic Activities that are Dependent on the Protection and Maintenance of the Integrity of Our Nation's Waters.

Hunting, fishing and other wildlife-related activity account for substantial economic activity in the United States. In 2001, the country had about thirty-eight million sportspersons, including hunters (thirteen million) and anglers (thirty-four million, including twenty-eight million freshwater anglers) who spent $70 billion on these activities.[45] In 2001, about 1.8 million waterfowl hunters, including just under 1.6 million duck hunters, expended approximately $935 million for hunting-related goods and services, generating a total economic output of over $2.3 billion.[46] Wildlife watching was also a tremendous source of economic activity in 2001: approximately 14.4 million Americans watched waterfowl and about 10.3 million Americans watched other water birds.[47]

The 2001 U.S. Fish and Wildlife Survey documented that many of those who participated in wildlife-related economic activity crossed state lines to do so. For example,

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[45] U.S. Fish and Wildlife Service, *2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, 5 (2002), *available at* http://www.census.gov/prod/2003pubs/fhw01-us.pdf (*2001) National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*).

[46] U.S. Fish and Wildlife Service 2005, *Economic Impact of Waterfowl Hunting in the United States: Addendum to the 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, 4 tbl.1 and 11 tbl.4 (July 2005), *available at* http://library.fws.gov/nat_survey2001_waterfowlhunting.pdf.

[47] *National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* at 88 tbl.40.

thirty percent of those who watched waterfowl, and thirty-one percent of those who watched other water birds, traveled across state lines to do so.[48]

The Great Lakes area and Michigan benefit greatly from hunting and fishing. In 2001, there were almost two million anglers in the Great Lakes area, nineteen percent of whom fished in states where they did not reside.[49] Twenty-six percent of the just under 1.4 million anglers in Michigan traveled from outside the state to fish there.[50] Lake St. Clair and the St. Clair River in Michigan were visited by approximately 96,000 anglers in 2001, who spent about 524,000 days fishing.[51] The Carabell and Rapanos wetlands may directly impact the water quality of Lake St. Clair.

Key game species like trout and ducks would decline significantly if tributaries and wetlands were not protected by the Act. Hunting and fishing activity would also drop as the quantity and quality of game diminished, resulting in a decrease in associated economic activity. Other fish and wildlife-related activities, such as waterfowl watching, and their associated economic activity would face similar declines.

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[48] *Id.* at 88 tbl.40.

[49] *Id.* at 80 tbl.27, 109 tbl.61.

[50] *Id.* at 103 tbl.55.

[51] *Id.* at 80 tbl.27.

II. CONGRESS INTENDED TO BROADLY PROTECT THE ENTIRE AQUATIC SYSTEM, INCLUDING TRIBUTARIES AND THEIR ADJACENT WETLANDS, AND THE CORPS PROPERLY ASSERTED JURISDICTION OVER THE WATERS IN RAPANOS AND CARABELL.

In *Riverside Bayview*, this Court found that the legislative history and language of the 1972 Act and its 1977 amendments made clear that Congress intended the Act to reach wetlands adjacent to other waters subject to the Act's jurisdiction. 474 U.S. at 138. The Court did not disturb this holding in deciding *SWANCC*. Rather, the Court endorsed its decision in *Riverside Bayview*, stating that, "We found that Congress' concern for the protection of water quality *and* aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *SWANCC*, 531 U.S at 167 (emphasis supplied) (citation omitted). In *SWANCC*, the Court only found that Congress did not intend to regulate certain intrastate ponds that were not adjacent to any other waters and had no connection whatsoever to other waters other than their use by migratory birds. *Id.* at 168 (declining to find that "the jurisdiction of the [Act] extends to ponds that are *not* adjacent to open water") (emphasis in original). Thus, *Riverside Bayview's* recognition of the significant hydrological and ecological effects of adjacent wetlands on navigable-in-fact waters has continued vitality and applies with equal force to the types of tributaries and adjacent wetlands at issue in these cases.

A. Courts Have Overwhelmingly Affirmed that Congress Clearly Intended the Act to Regulate Non-Navigable Tributaries.

From the Act's passage in 1972, courts have recognized Congress's intent to protect the entire tributary system of navigable waters. In 1974, the Sixth Circuit held

that non-navigable tributaries are plainly covered, noting that, "Congress' clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution part of a navigable stream." *United States v. Ashland Oil and Trans. Co.*, 504 F.2d 1317, 1323 (6th Cir. 1974).

Both before and after *SWANCC*, other courts have consistently concluded that even far-reaching tributaries of navigable waters are covered by the Act. In a case of recent vintage, Judges Michael, Wilkinson and Luttig of the Fourth Circuit held that because "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters," the intended reach of the CWA encompasses the "entire tributary system" of navigable waters. *United States v. Deaton*, 332 F.3d 698, 710, 712 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 1874 (2004).

Other Circuits have found the Act to cover tributaries other than navigable-in-fact waters, including a manmade ditch, *Deaton*, 332 F.3d at 712; *Treacy v. Newdunn*, 344 F.3d 407, 417 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 1874 (2004), irrigation canals, *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001), and storm drains that led to the Tampa Bay. *United States v. Eidson*, 108 F.3d 1336, 1342-43 (11th Cir. 1997). In a case involving an extended tributary system that included a manmade ditch, Judge Posner recently noted:

> A stream can be a tributary, why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the [Corps's] regulation as distinguishing between a stream and its manmade counterpart.

United States v. Gerke Excavating, 412 F.3d 804, 805-06 (7th Cir. 2005).

As the courts have recognized, tributaries can convey pollutants directly to navigable-in-fact waters, poisoning them for both human and wildlife use.[52] The same holds true for adjacent wetlands that "tend to drain" into tributaries and are likely to be hydrologically linked to navigable-in-fact waters. However, as the Court has recognized in *Riverside Bayview*, and reaffirmed in *SWANCC*, other equally compelling ecological reasons support jurisdiction over the waters at issue in these cases.

B. The Corps Was Reasonable in Regulating the Wetlands At Issue as "Adjacent Wetlands."

Riverside Bayview's finding that wetlands "adjacent" to waters subject to the Act's jurisdiction are themselves jurisdictional was based both on the tendency of adjacent waters to drain into other jurisdictional waters, and to the vital ecological functions these wetlands perform that maintain the integrity of navigable-in-fact waters. As the Court stated, "[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Riverside Bayview*, 434 U.S. at 134.

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[52] Petitioners rely on two Fifth Circuit decisions, *In re: Needham*, 354 F.3d 340 (5th Cir. 2003) and *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), *reh'g (en banc) denied*, 263 F.3d 167 (2001), for their position that the Act does not extend to the Rapanos and Carabell wetlands. *See, e.g.*, Pet. Carabell Br. at 36-7. These cases involved the Oil Pollution Act ("OPA"), not the Clean Water Act. In *Needham*, the court ultimately found that the spill at issue was covered by the OPA. *Needham*, 354 F.3d at 344-47. In *Rice*, the Court held that the OPA does not apply to discharges of oil onto dry land that seeped through the ground into groundwater which, in turn, contaminated several intermittent streams where there was little evidence in the record concerning how often the creek runs, how much water flows in it, and whether the creek ever flowed into a navigable body of water. *Rice*, 250 F.3d at 265, 269-72.

In addition, the Court deemed the Corps reasonable in regulating adjacent wetlands even though "not every adjacent wetland is of great importance to the environment of adjoining bodies of water" and "the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as 'waters.'" *Id.* at 135 n.9. The Court went on to state:

> If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment.

Id.[83] This conclusion is consistent with the Court's jurisprudence regarding generalized rules regulating a class: "To generalize is to be imprecise. Virtually *every* legal (or other) rule has imperfect applications in particular circumstances." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (emphasis in original).

The Court has therefore recognized that the class of wetlands adjacent to other jurisdictional water are "inseparably bound up" with navigable-in-fact waters and are enormously valuable to their integrity. No argument Petitioners put forth disputes this.

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[83] The Court went on to state that for wetlands that are not significantly intertwined with other waters, the Act provides an answer: activities impacting such waters may be permitted. *See Riverside Bayview*, 434 U.S. at 135 n.9.

Moreover, while the Court noted in *SWANCC* that a "significant nexus" between adjacent wetlands and navigable waters informed its decision in *Riverside Bayview*, this characterization did not dismiss the above holding in *Riverside Bayview*. *See SWANCC*, 531 U.S. at 167. ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

All of the wetlands at issue in these cases are clearly adjacent to jurisdictional waters. The Rapanos wetlands easily satisfy the adjacency requirement because all three sites share hydrological surface water connections to "waters of the United States," namely Lake Huron and Lake St. Clair. *See United States v. Rapanos*, 376 F.3d 629, 642-43 (6th Cir. 2004). Pollutants discharged into the wetlands could therefore have significant impacts on those navigable-in-fact waters as the water flows downstream. Similarly, the Carabell wetlands are adjacent to jurisdictional waters. As the court below found, the property containing the wetlands indisputably abuts an unnamed tributary that eventually connects to Lake St. Clair. *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704, 705-06, 708 (6th Cir. 2004). The Corps was reasonable to believe that the wetlands are likely hydrologically connected to the tributary flowing into Lake St. Clair given the tendency of wetlands separated from other waters by a berm to drain into the abutting water by seepage through, cuts in or overtopping of the berm. Furthermore, the record provides strong indications that additional facts would show that cuts in the berm or overtopping results in hydrological connections between the Carabell wetland and the abutting tributary. *See* Carabell J.A. at 186a-187a (testimony describing cuts and low areas in the berm where water might flow from wetland into nearby tributary during storm events). The Corps also found that the wetlands perform valuable water quality and ecological functions, preventing floods, retaining sediments and other pollutants that would otherwise be free to flow directly into jurisdictional waters, and providing habitat to aquatic wildlife. *Carabell*, 391 F.3d at 706. These factors satisfy the adjacency requirements detailed in *Riverside Bayview* and distinguish the Carabell wetlands from the ponds in *SWANCC*, which possessed none of these properties.

III. CONGRESS CAN REGULATE TRIBUTARIES AND ADJACENT WETLANDS UNDER THE COMMERCE CLAUSE, GIVEN THE SUBSTANTIAL EFFECT THAT ECONOMIC ACTIVITIES THAT POLLUTE THESE WATERS HAVE ON FOREIGN AND INTERSTATE COMMERCIAL ACTIVITY, SUCH AS HUNTING AND FISHING.

The regulation of tributaries and adjacent wetlands is constitutional under the commerce clause because it is both (1) regulation of the "channels of commerce," and (2) regulation of activities which, in the aggregate, have a substantial effect on interstate commerce. *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2005).[54] In this brief, we focus on the constitutionality of the regulation under the latter theory. In the aggregate, the placement of fill in wetlands for the purposes of economic development reasonably could substantially affect interstate commerce by degrading resources depended upon by a multi-billion dollar recreation and sporting industry, as well as related businesses.

In upholding Congress's broad prohibition on the manufacture, distribution or possession of marijuana under the Controlled Substances Act ("CSA"), this Court strongly affirmed Congress's power to regulate a class of activity "even if [the individual activity] be local and though it may not be regarded as commerce, . . . if it exerts a substantial economic effect on interstate commerce." *Raich*, 125 S.Ct. at 2205-06 (quoting from *Wickard v. Filburn*, 317 U.S. 111 (1942)). The Court has long endorsed this principle in many regulatory contexts.[55]

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[54] It is also possible that these waters may be regulated by Congress as "instrumentalities" of interstate commerce, or "things" in interstate commerce. *See Raich*, 125 S.Ct. at 2205.

[55] For instance, this Court has held that the prohibition on the shipment of goods produced in violation of wage and hour restrictions under the Fair Labor Standards Act was constitutional because "the total effect of the competition of many small producers may be great",

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Thus, in the case of "adjacent wetlands" and "tributaries," the analysis must focus on the substantial aggregate effect that destroying these resources may have on commerce. As the Seventh Circuit has stated:

> Obviously, filling in a 5.8 acre tract ... is not going to have a measurable effect on the depth of the Wisconsin or Mississippi Rivers. But that cannot be the test. The sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect.

Gerke, 412 F.3d at 806. Further, the Court noted that it "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 125 S.Ct. at 2208 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

Petitioners activities – development of a large condominium complex, *Carabell*, 391 F.3d at 706, and the filling of wetlands for development of a shopping center, *Rapanos*, 376 F.3d at 632 – are indisputably commercial in nature. As discussed above, the wetlands these economic activities affect belong to a class of waters that play a major role in sustaining a multi-billion dollar hunting and

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United States v. Darby, 312 U.S. 100, 123 (1941), and that Congress was within its powers to protect "prime farmland" from mining impacts under the Surface Mining Control and Reclamation Act even though the likely impacts to total farmland from mining was small. *Hodel v. Indiana*, 452 U.S 314, 321-30 (1981); *see also*, *Perez v. United States*, 402 U.S. 146, 153-4 (1971) (aggregate effects relied on to uphold "loan sharking" prohibition of Consumer Credit Protection Act); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (aggregate effects relied on to uphold prohibition of racial discrimination in restaurants under the Civil Rights Act of 1964).

fishing industry. Therefore, the Court has a rational basis for concluding that unregulated commercial development of such waters, in the aggregate, would have substantial impacts on interstate commerce and adversely affect America's long-standing hunting and fishing industries.

Raich dispels Petitioners' contention that Section 404 regulation should contain a "jurisdictional element" giving the Corps "a method for distinguishing between wetlands that would substantially affect interstate commerce and wetlands that would not." Pet. Carabell et al. Br. at 43. The Court found that, "[W]e have often reiterated that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Raich*, 125 S.Ct. at 2209 (citations and internal quotes omitted). Unless a "particular statute or provision [falls] outside Congress' commerce power in its entirety," the fact that the statute may apply in instances where the activity is not strictly commercial is not fatal to the exercise of commerce clause authority. *Id.* at 2209.

Regulation of tributaries and adjacent wetlands can easily be distinguished from the Court's holdings in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), where the Court ruled that the Commerce Clause did not provide Congress power to regulate certain non-economic activities: intrastate possession of a gun near a school zone under the Gun-Free School Zone Act of 1990, and intrastate crimes involving violence against women under the Violence Against Women Act of 1994, respectively. Unlike the statute in *Lopez*, which was a "brief, single-subject statute making it a crime for an individual to possess a gun in a school zone," *Raich*, 125 S.Ct. at 2209, the Section 404 permitting system is an essential part of a large comprehensive regulatory scheme that extensively touches economic activities substantially affecting interstate commerce. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981) ("The 'major purpose'

of the [CWA] was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" (quoting S.Rep.No.92-414, at 95, 2 Leg.Hist. 1511)) (emphasis in original as supplied by the Court).

Justice Scalia concurred that *Lopez* and *Morrison* "do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Raich*, 125 S.Ct. at 2218 (Scalia, J., concurring). This reasoning plainly applies here to uphold the constitutionality of the Corps' "adjacency" and "tributary" regulations.

Moreover, despite Petitioner Carabell's claim that Section 404 would regulate many activities that are not economic, most wetland fills involve economic activity at least as substantial as that in *Wickard*. In that case, the Court upheld the constitutionality of the Agricultural Adjustment Act, finding that wheat homegrown to supply the grower could have an economic effect on the market by removing a consumer from the market, thus influencing wheat prices. *See Wickard*, 317 U.S. at 127-29. The Court found that even though a farmer's "own contribution to the demand for wheat may be trivial ... his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

Most wetland and tributary fills occur for economic activity, such as the type of residential and commercial development at issue in these cases[16] When the overall

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[16] *See, e.g., Deaton*, 332 F.3d at 702 (fill placed in wetlands in effort to destroy wetlands for a residential subdivision); *Hoffman Homes, Inc. v. U.S. Environmental Protection Agency*, 999 F.2d 256, 257 (7th Cir. 1993) (wetlands filled by Hoffman Homes to construct a subdivision); *see also* Samet, M., *The Clean Water Act: Commerce Has Everything to*

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regulatory scheme of the Act as it applies to tributaries and adjacent wetlands is examined it becomes clear that it regulates economic commercial and residential development and other economic activities that substantially impact the multi-billion dollar sporting industry and other industries dependent on healthy water resources. Furthermore, these cases concern Congress's ability to regulate the placement of other pollutants generated by myriad industrial and other economic activities into tributaries and adjacent wetlands that flow directly into economically important navigable-in-fact waters, further supporting regulation under the commerce clause.[27]

Similarly unpersuasive is Petitioner Carabell's argument that jurisdiction in this case violates the commerce clause because congressional findings concerning the CWA contain "no cogent rationale for permitting the extension of federal authority" over the Carabell wetlands. Pet. Carabell et al. Br. at 44. The Court has previously observed that it has "never required Congress to make particularized findings in order to legislate . . . absent a special concern such as the protection of free speech." *Raich*, 125 S.Ct. at 2208 (citation omitted). Further, "Congress cannot be expected (and certainly should not be required) to include specific findings on each and every

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Do With It, NAT'L WETLANDS NEWSLETTER, Mar.-Apr. 2004, at 4 (stating that "the majority of acreage for which section 404 permits are sought is intended for commercial, industrial, or other economic uses") (citing, Albrecht, V. and B. Goode, *Wetland Regulation in the Real World*, Beveridge & Diamond (1994)). Moreover, even fills for purely "aesthetic" purposes, *see* Pet. Carabell et al. Br. at 43, on private land would likely affect the market value of that property and potentially nearby properties, as well as having potential market impacts through the purchase of fill or the hiring of labor.

[27] For instance, EPA regulations which cover discharges into waters – including those similar to the ones at issue in this case – for purposes of regulation under Section 402 have over 1,500 pages devoted to effluent guidelines for discharges caused by 73 different categories of industrial activity alone. *See, e.g.*, 40 C.F.R. pts. 403-610.

substance contained [in the CSA]." *Raich*, 125 S.Ct. at 2208 n.32. This reasoning applies equally to the CWA.

In sum, there are numerous ways that economic activities causing the destruction of tributaries and adjacent wetlands could have a substantial aggregate effect on interstate commerce. As described above, these waters provide breeding grounds, habitat and food for various fish, game and other species. Additionally, they protect habitat in navigable-in-fact waters by filtering out nutrients and other pollutants, preventing erosion, ensuring healthy flows, and preventing flooding. They also possess the ability to transport poison and other discharged pollutants to downstream navigable-in-fact waters, harming their fish and wildlife populations. As a class, therefore, tributaries and adjacent wetlands are crucial to the viability of hunting, fishing, wildlife watching and other wildlife-related interstate commercial activity.

Moreover, given that these resources and the aquatic systems they support cross state lines, it is necessary to protect them at the federal level. If not protected, their aggregate loss or degradation will likely have severe deleterious effects upon the viability of fish, game, and other wildlife. As game, fish and other wildlife suffer, it reasonably follows that hunting, fishing and wildlife-related economic activity will also suffer. As numerous courts have found, there is no constitutional impediment to Congress regulating tributaries and adjacent wetlands linked to navigable-in-fact waters, and the protection of these national economic resources from harm is plainly within Congress's authority to regulate commerce.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

JAMES MURPHY
NATIONAL WILDLIFE FEDERATION
58 State Street
Montpelier, Vermont 05602
(802) 229-0650
Counsel of Record for Amici Curiae

Nos. 04-1034 and 04-1384

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*
Petitioners,

v.

UNITED STATES,
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JUNE CARABELL, *et al.*
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U.S. ARMY CORPS OF ENGINEERS
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* JOHN J. DUNCAN, JR. IN SUPPORT OF THE PETITIONERS

THOMAS C. JACKSON
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

3. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

4. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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BRIEF OF *AMICUS CURIAE* JOHN J. DUNCAN, JR. IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, this brief is submitted on behalf of the Honorable John J. Duncan, Jr., as *amicus*

curiae, pursuant to Rule 37 of the Rules of this Court. The Honorable John J. Duncan, Jr. is the Chairman of the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure of the U.S. House of Representatives, which has jurisdiction over the Clean Water Act and responsibility for oversight over the implementation of that Act. As a result, *amicus* has a strong interest in the proper construction and enforcement of the Clean Water Act.[1]

SUMMARY OF ARGUMENT

This case is about continuing efforts of the U.S. Army Corps of Engineers to extend the boundaries of its jurisdiction under the Clean Water Act beyond the limits on such jurisdiction recognized by this Court in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), and about judicial acquiescence in these overly expansive assertions of jurisdiction. In *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2003), cert. granted, 126 S. Ct. 414 (2005) (Pet. App. A1), and *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), cert. granted, 126 S. Ct. 415 (2005) (Pet. App. 1a), the U.S. Court of Appeals for the Sixth Circuit recognized that under *SWANCC*, the Corps' jurisdiction over wetlands or water bodies must be premised on a "significant nexus" between the wetlands or waters at issue and waters that are navigable-in-fact. However, the Sixth Circuit's interpretation of the "significant nexus" requirement is inconsistent with *SWANCC*. In essence, the Sixth Circuit gave the Corps broad authority to control the use of any piece of land that exhibits the soils, vegetation, and hydrology that are characteristic of wetlands as long as that

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amicus curiae* or his counsel, made any monetary contribution to the preparation or submission of this brief.

land "neighbors" any natural or man-made means of conveying surface water that the Corps considers to be a "tributary" of waters that are navigable-in-fact. Under that standard, the Corps may assert jurisdiction over land, *as a matter of law*, even if the land is hydrologically isolated from all water that is navigable-in-fact,[2] and regardless of whether dredged or fill material that an owner proposes to place on his or her land will ever have any discernable impact on any water that is navigable-in-fact.[3] Thus, the issue before the Court is whether the Sixth Circuit's interpretation of the "significant nexus" requirement – upholding jurisdiction over wetlands that are hydrologically isolated from navigable waters or that have a hydrological connection that is so attenuated that pollutants discharged into the wetlands would in fact never affect the navigable waters – can be sustained in light of this Court's decision in *SWANCC*.

That question must be answered in the negative. In authorizing these assertions of jurisdiction, the Sixth Circuit misinterpreted the scope and structure of the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000). The Act regulates "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2000). As this Court observed in

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[2] *Carabell*, 391 F.3d at 705 (Pet. App. 3a) (upholding grant of summary judgment for Corps despite finding that "[t]he berm edging the Carabells' property serves to block immediate drainage of surface water out of the parcel into the ditch.").

[3] Thus, in *Rapanos*, 376 F.3d at 639 (Pet. App. A16), the court of appeals required only a hydrological connection to navigable waters to establish jurisdiction over a wetland, even though the district court in a related case had found that the closest navigable waters are *20 miles away* and that the activities of Mr. Rapanos had no direct impact on those waters. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015-16 (E.D. Mich. 2002), rev'd, 339 F.3d 447 (6th Cir. 2003).

SWANCC, the use of the term "navigable waters" to define the scope of jurisdiction under the Clean Water Act demonstrates that in passing the Act, Congress intended to assert its traditional authority over navigation. 531 U.S. at 172. The Court further held that the Corps' assertion of jurisdiction over waters that had no connection to traditionally navigable waters invoked the outer limits of congressional authority and encroached on traditional state authority over land and water use. *Id.* at 174.[4] Given these concerns, the Court concluded that wetlands or other water bodies must have a significant nexus with navigable waters in order to qualify as waters of the United States. *Id.* at 167.

The Sixth Circuit acknowledged the "significant nexus" requirement, but applied it in a way that ignores the concerns underlying the decision in *SWANCC* and that conflicts with the text of the Act in fundamental ways. First, the Sixth Circuit authorized the assertion of jurisdiction over wetlands that were hydrologically isolated from any navigable waters or tributaries thereof simply because the Corps determined those wetlands to be "adjacent" to a "tributary" of a navigable water. However, that assertion of jurisdiction over wetlands "neighboring" waters that are not even themselves navigable is flatly inconsistent with the Court's decision in *SWANCC*, which rejected an attempt by the Corps to regulate waters that had no hydrological connection with navigable waters. The Corps cannot be allowed to evade *SWANCC*'s jurisdictional limitation through the simple expedient of deeming wetlands to be "adjacent" to tributaries of navigable waters and assuming that the adjacency label is sufficient to establish a significant nexus.

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[4] Hereinafter such traditionally navigable waters will be referred to simply as "navigable waters."

Second, the Sixth Circuit erroneously determined that whenever there is a hydrological connection between a wetland and a navigable water, that fact alone can be considered dispositive of the existence of a significant nexus that is sufficient to establish Clean Water Act jurisdiction. While a mere hydrological connection – particularly one that is highly attenuated – may serve as a nexus with navigable waters, such a nexus may or may not be significant. A determination of significance must take other factors into account. In particular, the extent to which wetlands may be considered "waters of the United States" depends in part on whether material placed in the wetlands can reasonably be expected to reach navigable waters. In addition, because the Clean Water Act regulates point source discharges of pollutants and not pollution from nonpoint sources, the courts must be careful not to allow the Corps and the U.S. Environmental Protection Agency to use the regulation of wetlands as a backdoor method of regulating nonpoint sources and land use.

Finally, the Sixth Circuit failed to consider that, in both of the decisions under review, it was authorizing the assertion of jurisdiction over wetlands based on the purported hydrological connection between the wetlands and conveyances that qualify as point sources under section 402 of the Clean Water Act, 33 U.S.C. § 1342 (2000). The Clean Water Act does not require a permit to discharge pollutants into a point source. It regulates the discharge of pollutants from a point source. The point source itself is not a water of the United States and wetlands may not be considered waters of the United States by virtue of being adjacent to the point source.

ARGUMENT

I. There Is No Clean Water Act Jurisdiction Over Wetlands That Are Hydrologically Isolated From Navigable Waters.

In *Carabell*, the Sixth Circuit held that the significant nexus with navigable waters that is required for Clean Water Act jurisdiction could be satisfied by a determination that the wetlands in question are "adjacent" to a tributary of navigable waters within the meaning of the Corps' regulations. 391 F.3d at 709-10 (Pet. App. 10a-12a). However, the loose label of "adjacency" cannot substitute for a critical case-by-case appraisal of whether a significant nexus with navigable waters in fact exists.

Notwithstanding the court's finding of "adjacency," the facts demonstrate that the wetlands at issue in *Carabell* are hydrologically isolated from navigable waters. The Sixth Circuit stated that "[t]he berm edging the Carabells' property serves to block immediate drainage of surface water out of the parcel into the ditch" running parallel to the berm along the edge of the property. 391 F.3d at 705 (Pet. App. 3a). The Sixth Circuit recognized that "the *SWANCC* Court made clear that isolated intrastate waters cannot be subject to the Corps' jurisdiction under the CWA." *Id.* at 709 (Pet. App. 10a). Despite this recognition, the Sixth Circuit upheld summary judgment for the Corps by relying on Corps regulations that assert Clean Water Act jurisdiction over wetlands that are adjacent to tributaries of waters of the United States.[5]

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[5] Regulations issued by the Corps define "waters of the United States" to include waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide (*i.e.*, traditional navigable waters) (33 C.F.R. § 328(a)(1) (2005)); interstate waters including interstate wetlands (*id.* § 328(a)(2)); all other waters the use, degradation or destruction of which would

This result ignores the basis of this Court's opinion in *SWANCC*. In *SWANCC*, the Court found that when Congress enacted the Clean Water Act in 1972, it intended to regulate wetlands and other water bodies that are inseparably bound up with navigable waters. 531 U.S. at 167. However, it is difficult to see how a wetland that does not have a surface water connection with navigable waters could have a significant nexus with those waters.[6] Pollutants discharged into such a wetland cannot reach navigable waters and therefore cannot impact such waters in any way that could be considered significant. The fact that the Corps determined that filling in the wetlands at

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affect interstate or foreign commerce (*id.* § 328(a)(3)); all impoundments of waters otherwise defined as waters of the United States (*id.* § 328(a)(4)); *tributaries of waters identified in paragraphs (1) through (4)* (*id* § 328(a)(5)); the territorial seas (*id.* § 328(a)(6)); and *wetlands that are adjacent to any of the waters identified in paragraphs (1) through (6)* (*id.* § 328(a)(7)). EPA's regulations include the same definition for the purpose of implementing other sections of the Act. 40 C.F.R. § 230.3(s) (2005).

[6] While a wetland that has no surface water connection with navigable waters could have an indirect connection to such waters through groundwater, the courts have generally recognized that groundwater is a state-regulated resource that is not covered under the Clean Water Act. See, *e.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). As such, groundwater cannot serve as a basis for a hydrological connection sufficient to establish jurisdiction under the Act. See *Oconomowoc Lake*, 24 F.3d at 962. Contamination of groundwater, which can result from releases of contaminants onto dry ground as readily as through releases to wetlands, is generally addressed through other federal and state authorities such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000) ("CERCLA").

issue in *Carabell* would reduce habitat for wildlife[7] cannot be used to establish a significant nexus, as this Court clearly stated in *SWANCC*. *Id.* at 171-72.

The only potential pollution of navigable waters emanating from the property at issue that was identified in *Carabell* is ordinary nonpoint source runoff that may occur as a result of the development of *any* piece of property, regardless of whether it is a wetland. *Carabell*, 257 F. Supp. 2d at 932 (Pet. App. 50a-51a). However, the Clean Water Act is not a land preservation statute. Changes in land use are not regulated under the Clean Water Act but are instead left to the states. See 33 U.S.C. § 1251(b) (2000). Thus, even if development of the wetlands would increase impervious surfaces, potentially causing runoff and erosion affecting water quality, such impacts cannot be used to establish a significant nexus without upsetting the federal-state balance inherent in the Act.[8] Accordingly, in *Carabell*, as in *SWANCC*, there is no federal jurisdiction under the Clean Water Act.

The Sixth Circuit attempted to justify the Corps' jurisdictional determination in Carabell by relying on this Court's statement in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985), that "[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." See *Carabell*, 391 F.3d at 709 (Pet. App. 11a). However, the

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[7] *Carabell v. U.S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917, 924 (E.D. Mich. 2003), aff'd 391 F.3d 704 (6th Cir. 2004), cert. granted, 126 S. Ct. 414 (2005) (Pet. App. 33a-34a).

[8] Increased runoff caused by the creation of impervious surfaces is not a discharge of a pollutant from a point source. If collected in a conveyance, such runoff may be regulated under section 402(p) of the Clean Water Act as a stormwater discharge. 33 U.S.C. § 1342(p) (2000). Otherwise, it is nonpoint source pollution, the regulation of which is left to the states.

Court in *Riverside Bayview* was focused on the question of jurisdiction over wetlands that directly abut open water and whether frequent flooding of the wetland by the open water is necessary to establish jurisdiction. 474 U.S. at 131. Therefore, the Court's affirmation of the Corps' determination to regulate adjacent wetlands must be read in that context, *i.e.*, as affirming the Corps' definition of adjacent wetlands as it applies to wetlands that "actually abut[ ]" navigable waters, *id.* at 135.

The fact that the Corps may presume a significant nexus where wetlands directly abut open waters does not mean that it is reasonable to presume such a nexus where wetlands are, as here, geographically removed from open water. Indeed, the Corps' application of the adjacency concept demonstrates the highly elastic nature of this concept in practice and undercuts any suggestion that adjacent wetlands by their very nature have a significant nexus with navigable waters. For example, some Corps districts routinely assert jurisdiction over wetlands that are 200 feet away from any tributary of a navigable water, while other districts may consider wetlands to be adjacent to waters of the United States – and therefore consider the wetlands themselves to be waters of the U.S. – if the wetlands are 500 feet from a navigable water or a tributary. See U.S. General Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 19 (2004) (hereinafter "*GAO Report*"). Some Corps districts consider wetlands to be adjacent to navigable waters or their tributaries if the wetlands are within the 100-year floodplain of the navigable water or tributary in question, an area that can extend several miles from the navigable water or tributary. *Id.* at 17-18.

Thus, the notion of adjacency can be very expansive and can serve as a license to the Corps to regulate broad areas of the landscape regardless of the presence of any

hydrological connection – however remote – between the areas being regulated and the navigable waters that are the focus of Clean Water Act authority. Such assertions of jurisdiction result in "a significant impingement of the States' traditional and primary power over land and water use," *SWANCC*, 531 U.S. at 174,[9] and cannot be sustained.

II. A Hydrological Connection Alone Does Not Constitute A Significant Nexus Between A Wetland And Navigable Waters Sufficient To Establish Jurisdiction As A Matter of Law.

The Sixth Circuit has also expanded the "significant nexus" test by ruling that a mere hydrological connection to navigable waters can, as a matter of law, establish federal jurisdiction over a wetland. *Rapanos*, 376 F.3d at 639 (Pet. App. A16) (the presence of a hydrological connection is a significant nexus between the wetlands and navigable waters, *citing Rapanos*, 339 F.3d at 453). That ruling, if left undisturbed, would drain the "significant nexus" test established in *Riverside Bayview* and *SWANCC* of any meaning.

The government's position in *Carabell* provides a telling example of the lengths to which the Corps will push the concept of a "hydrological connection" in order to assert jurisdiction over a wetland. In its opposition to the petition for certiorari in *Carabell*, the government has suggested that the wetlands at issue there are not hydrologically isolated from the ditch running along one edge of the property (as the court of appeals found) because, *inter alia*, of the fact that the berm separating the wetlands on the property from the ditch may be overtopped when water levels on the property are high. See U.S. Br. in Opp., No.

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[9] This impingement on state authority to control land and water use is dramatized in *Carabell* by the fact that the Corps in that case effectively vetoed the state's approval of the proposed development of portions of the property. 391 F.3d at 706 (Pet. App. 4a-5a).

04-1384, at 5. The government does not indicate how often such overtopping allegedly occurs, but based on the Corps' practice in other cases it must be presumed that the Corps would take the position that overtopping would be sufficient to establish a surface hydrological connection – and therefore, according to the Sixth Circuit, a significant nexus – if such overtopping occurred only once every hundred years. See *GAO Report* at 17-18 (written guidance from the Galveston District of the Corps states that the district generally regulates wetlands in the 100-year floodplain because this type of flooding is sufficient evidence of a hydrological connection to establish jurisdiction).

It strains credulity to believe that a "hydrological connection" that manifests itself on such an infrequent basis could be deemed significant as a matter of law. Under that approach, virtually all wetlands would become subject to the Corps' jurisdiction, an outcome rejected in *SWANCC*. As the district court observed in *Rapanos*:

> It is worth noting that the majority opinion in [*SWANCC*] repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters * * *. The dissent notes that the wetlands in [*SWANCC*] are at least ecologically connected * * *. Despite this, the majority still refers to the wetlands as isolated * * *.

Rapanos, 190 F. Supp. 2d at 1014, n.3. See also *FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (because *SWANCC* has substantially altered the meaning of "navigable waters" in the CWA, a "significant nexus" must constitute more than a mere "hydrological connection").

The Corps has strained the concept of "hydrological connection" not only in terms of frequency but distance as well. Here *Rapanos* provides the example. In that case, the district court found that the nearest navigable water was 20 miles away from the Salzburg site. 190 F. Supp. 2d at 1012. In other cases, courts have upheld assertions of jurisdiction on the basis of a hydrological connection where the nearest navigable water was 190 miles downstream. See *United States v. Buday*, 138 F. Supp. 2d 1282, 1283 (D. Mont. 2001). In such cases, the courts have uncritically assumed that such a highly attenuated hydrological connection constitutes a significant nexus, in effect using any surface water connection – no matter how attenuated or remote – as a proxy for proof of a true significant nexus.

The Sixth Circuit's approach untethers the "significant nexus" test from its moorings. Taken to its logical extreme, the principle adopted by the Sixth Circuit could lead to federal regulation of any land use that could have an effect on navigable waters, notwithstanding the fact that Congress limited the regulatory reach of the Clean Water Act to the discharge of pollutants from point sources into navigable waters.

That concern is not speculative. In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), for example, the plaintiff alleged that the jurisdictional scope of the Oil Pollution Act (which applies to navigable waters and includes a definition of navigable waters identical to that in the Clean Water Act) extends to the release of oil on dry land that seeped into groundwater. In *Rice*, the Fifth Circuit declined to find that the land at issue was subject to federal jurisdiction, but the reasoning of the Sixth Circuit in *Rapanos* would support the opposite conclusion. Compare *Rice*, 250 F.3d at 269, 272 with *Rapanos*, 339 F.3d at 451.

If the limits on Clean Water Act jurisdiction recognized by the Court in *SWANCC* are to be respected, the Corps cannot be allowed to simply assume that a significant nexus

exists whenever it is able to divine a surface water connection with navigable waters. Rather, the significance of a nexus with navigable waters must be determined by reference to the principal focus of the Clean Water Act, *i.e.*, protection of the navigable waters that Congress primarily intended to regulate. See *SWANCC*, 531 U.S. at 172. Thus, "significance" must be determined by, *inter alia*, the discernible effects that the activity to be regulated would have on navigable waters. In particular, the Corps should be required to demonstrate at least some reasonable likelihood that pollutants such as fill material would reach or otherwise significantly effect navigable waters in order to establish a basis for jurisdiction.[10] In the absence of such a requirement, the Corps will continue to exercise broad jurisdiction that exceeds the proper bounds of its Clean Water Act authority and that impinges on state regulation of land and water use.

III. There Is No Clean Water Act Jurisdiction Over Wetlands That Are Adjacent To Point Sources.

The Sixth Circuit's approach to Clean Water Act jurisdiction is also problematic because it treats ditches as waters of the United States rather than as what they are and were intended to be, *i.e.*, man-made structures for conveying water to water bodies. This approach ignores the careful structure of the Act. The Corps and reviewing courts must consider how all sections of the Clean Water Act work together to protect navigable waters. They

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[10] Pollutants that do not reach navigable waters may be addressed through a variety of other authorities, including various state regulatory and cleanup programs and, in appropriate circumstances, federal authorities such as CERCLA. See, *e.g.*, 42 U.S.C. §§ 9601(8), 9607 (2000) (imposing liability on various parties for releases of hazardous substances into the "environment," which is defined to include any surface water or groundwater within the United States).

should not, contravening statutory[11] and constitutional[12] constraints, expand federal jurisdiction over land and water resources beyond that which is necessary to protect navigable waters.

The Sixth Circuit proceeded as if the only regulatory tool available to protect the quality of the Nation's waters is a finding that a ditch or other conveyance, through which pollutants might conceivably be transported to navigable waters, is itself a "water of the United States." But that ignores the role that section 402 of the Clean Water Act, 33 U.S.C. § 1342, plays in protecting navigable waters from pollution.

Section 402 authorizes the issuance of permits for the discharge of pollutants from point sources into waters of the United States. The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch*, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000) (emphasis added). The point source – such as a man-made drainage ditch – itself is not a "water of the United States." See, *e.g.*, *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (a point source conveys pollutants to navigable waters). It is therefore not regulated. However, the discharge from the

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[11] *See SWANCC*, 531 U.S. at 166-67 (noting that in the Clean Water Act, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.'").

[12] *See SWANCC*, 531 U.S. at 174 (noting that the exercise of federal jurisdiction over land and water can raise "significant constitutional questions").

point source *into* waters of the United States is regulated. See 33 U.S.C. §§ 1311(a), 1362(12) (2000). Such point source discharges generally require a permit under section 402 or section 404 of the Act, 33 U.S.C. §§ 1342, 1344. This regulatory structure imposes federal authority at the proper place to protect the federal interest in navigable waters without infringing upon the use of private property and other land and water uses traditionally regulated by states, *i.e.*, the point of discharge into navigable waters.

For example, in *In re Needham*, 354 F.3d 340 (5th Cir. 2003), the Fifth Circuit found that a discharge of oil was regulated without any need to find that non-navigable channels through which the oil passed were waters of the United States. That case (brought under the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701-20 (2000)), involved oil that had spilled into a non-navigable drainage ditch that was not adjacent to a navigable water. It was stipulated that the "oil was discharged from the Thibodeaux facility into Bayou Cutoff *and Bayou Folse*." *Needham*, 354 F.3d at 346 (emphasis in original). The oil spill on the Thibodeaux facility itself was not regulated under OPA or the Clean Water Act, even when the oil moved into a drainage ditch adjacent to the facility or into Bayou Cutoff (a non-navigable downstream water). But, when the oil discharged into Bayou Folse – which was immediately adjacent to a navigable water and therefore within the jurisdiction of the Clean Water Act – the release of oil became regulated under OPA. *Id.* at 347; 33 U.S.C. § 2702 (2000) (imposing liability on persons responsible for the discharge of oil from a facility into navigable waters). The same principles apply under the Clean Water Act.[13]

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[13] But see *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). The *Talent* case involved the release of a pesticide into an irrigation canal that discharged into navigable waters, causing a fish kill. *Id.* at 528. Under ordinary operations, the

Thus, under the Clean Water Act there is no need to stretch the statutory text to find that ditches, sewers, or other conveyances are themselves waters of the United States to protect navigable waters from discharges of pollutants from those conveyances. Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311, 1342 (2000), regulate these discharges.

At the same time, ignoring the distinction between point sources and navigable waters could lead to the assertion of jurisdiction over all things through or over which water flows, including sewer pipes, roads, driveways, and even the ground, as well as the ditches at issue in *Rapanos* and *Carabell*. That result would upset the careful regulatory balance established in the Clean Water Act. For example, section 402(p) of the Clean Water Act requires municipalities to bring storm water discharges from municipal separate storm sewer systems under Clean Water Act regulation over time and to regulate those discharges "to the maximum extent practicable." 33 U.S.C. § 1342(p). Allowing municipalities time to come into compliance and establishing a separate, "maximum extent practicable" standard for these discharges from the ditches and storm sewers in our cities and suburbs demonstrates the choice of Congress to subject discharges from these types of conveyances to less stringent regulation than discharges

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irrigation district closed off its canal when applying pesticides to control the growth of aquatic weeds. However, the irrigation district failed to do so at least once. *Id.* at 533. The Ninth Circuit ruled that the irrigation ditches were waters of the United States. *Id.* at 534. However, the parties in that case did not raise and the court did not consider the issue of whether the canal was more properly considered a point source. As in *Needham*, the facts in *Talent* would still lead to the conclusion that an unpermitted discharge occurred. However, that discharge occurred at the point where the canal joined navigable waters, not at the point of application of pesticides into the canal.

from industrial sources. However, that legislative intent could be completely upset by the decisions of the lower courts. Under the rationale of the decisions below, municipal separate storm sewer systems could themselves be considered waters of the United States, prohibiting unpermitted discharges into those sewers and requiring the water in the sewer itself to meet water quality standards. That would result in far more extensive regulation of municipal sewer systems than that contemplated by section 402(p) of the Clean Water Act.

Nor can the broad goals of the Clean Water Act be used to justify an expansive definition of the regulatory authority conferred by the Act. The Clean Water Act carefully prescribes in ninety-four separate sections how the goals of the Act are to be implemented.[14] Implementing agencies and reviewing courts must use the specific terms of the Clean Water Act to determine the Act's jurisdictional scope.[15] As the Court has observed:

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[14] See, *e.g.*, 33 U.S.C. §§ 1251-74 (2000) (research and grant programs, including grants for groundwater monitoring); *id.* § 1288 (calling for the development of State areawide waste treatment management plans, including identification and control of nonpoint sources); *id.* §§ 1291-1301 (2000) (construction grants for publicly owned treatment works); *id.* § 1329 (2000) (assistance for the management of unregulated nonpoint sources); *id.* § 1342 (2000) (permitting program for point source discharges, with exemptions); *id.* § 1344 (2000) (permitting program for discharges of dredged and fill material, with exemptions).

[15] Section 301 of the Clean Water Act prohibits the discharge of pollutants from point sources. 33 U.S.C. § 1311(a). This leaves nonpoint sources of pollution unregulated under the Act, with such regulation being left to the states. Because the implementing agencies have no authority to regulate nonpoint source runoff and may not impinge on State authority over land use, the implementing agencies must avoid the regulation of general runoff from land. When runoff flows from the surface of land into a conveyance that is a point source under section 402 of the Act (such as a ditch),

> No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987).

CONCLUSION

The Clean Water Act is not a grant of plenary authority to take any action to prevent all adverse impacts to waters or wetlands. As this Court has stated, jurisdiction under the Act is limited to traditionally navigable waters and wetlands and other waters that have a significant nexus to those navigable waters. The Sixth Circuit's approach to defining "significant nexus" threatens to eviscerate the jurisdictional limits recognized by the Court in *SWANCC*, allowing the Corps to engage in broad regulation of land and water use. While the Act provides for research, planning, technical assistance, and grants to help protect all surface water and groundwater from both point and nonpoint sources of pollutants and pollution, the regulatory reach of the Act is limited to the prohibition of the discharge of pollutants from point sources into navigable waters without a permit. In determining the jurisdictional scope of the Corps' regulatory authority, this Court should avoid expanding that authority to encompass land conservation and habitat preservation. Because this approach will impinge on traditional state prerogatives, the decisions of the court below should be reversed.

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navigable waters are protected by the regulation of the discharge from the point source, so no regulation of land use is appropriate or necessary.

Respectfully submitted.

THOMAS C. JACKSON
Counsel of Record
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae

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IN THE

Supreme Court of the United States

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ECOLOGICAL SOCIETY OF AMERICA, SOCIETY OF WETLAND SCIENTISTS, AMERICAN SOCIETY OF LIMNOLOGY AND OCEANOGRAPHY, AND ESTUARINE RESEARCH FEDERATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES BLANDING HOLMAN, IV
Counsel of Record
DERB S. CARTER, JR.
SOUTHERN ENVIRONMENTAL LAW CENTER
200 W. Franklin Street
Suite 330
Chapel Hill, NC 27516
(919) 967-1450

Counsel for Amici Curiae

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The Ecological Society of America, Society of Wetland Scientists, American Society of Limnology and Oceanography, and Estuarine Research Federation, as *amici curiae*, respectfully submit this brief in support of Respondents United States Army Corps of Engineers and the United States Environmental Protection Agency.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici are the leading professional associations of wetland and aquatic scientists in the United States. The Ecological Society of America (ESA) is an organization of scientists founded in 1915 to promote ecological science by improving communication among ecologists, raise the public's level of awareness of the importance of ecological science, and ensure the appropriate use of ecological science in environmental decision making by enhancing communication between the ecological community and policy-makers. Ecology is the scientific discipline that is concerned with the relationships between organisms and their past, present, and future environments. ESA has published the scientific journal *Ecology* since 1920. The Society's Aquatic Ecology Section is its largest section.

The Society of Wetland Scientists (SWS) is an international organization formed in 1980 to further scientific and educational objectives related to wetland science and to encourage and strengthen professional standards in all

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[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

activities related to wetlands science. SWS has 4200 members and publishes a quarterly journal *Wetlands* concerned with all aspects of wetlands biology, ecology, hydrology, water chemistry, soil and sediment characteristics, and management. SWS established a Professional Certification Program to serve the public's need to identify qualified individuals in the practice of wetland science.

The American Society of Limnology and Oceanography (ASLO) is a professional organization formed in 1948 for researchers and educators in the field of aquatic science. Limnology is the scientific study of the physical, chemical, hydrological, and biological aspects of inland water bodies. ASLO promotes integration and communication of knowledge across the full spectrum of aquatic science and the scientific stewardship of aquatic resources for the public interest. ASLO publishes the scientific journal *Limnology and Oceanography*.

The Estuarine Research Federation (ERF) is a professional organization founded in 1971 to promote research on estuaries and coastal waters and to provide information and advice on matters concerning estuaries and the coastal zone. ERF publishes the scientific journal *Estuaries and Coasts*.

Amici support the use of the best available scientific information in making decisions on the use and management of wetlands and aquatic resources.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Riverside Bayview Homes, Inc.*, this Court upheld Clean Water Act regulation of wetlands adjacent to open waters and other waters of the United States because such wetlands are "inseparably bound up" with those waters and Congress intended to enact a comprehensive

program to control water pollution at its source. 474 U.S. 121, 134 (1985) ("*Riverside Bayview*").

The *Rapanos* petitioners challenge the essential holding of *Riverside Bayview* and contend Clean Water Act regulation is limited to wetlands that directly abut large navigable water bodies, excluding from regulation tributaries and associated wetlands. The *Carabell* petitioners contend that wetlands separated from a tributary by a narrow earthern berm are not regulated. Each of the petitioners effectively challenges the validity of federal regulations defining "adjacent" wetlands as "waters of the United States."

As developed below, the definition in question has a firm scientific foundation. Wetlands adjacent to tributaries are inseparably bound up with those and other downstream waters, and because of that connection serve functions essential to maintenance of water quality in the nation's navigable waters. Because adjacent wetlands form the primary interface between terrestrial systems and downstream waters, they exert a powerful influence on downstream water quantity and quality. For example, adjacent wetlands in the upper Mississippi River watershed remove nutrients such as nitrogen – which plays a large role in the hypoxic "dead zone" in the Gulf of Mexico – from water and prevents the pollutants from flowing downstream. It follows that the failure to protect wetlands adjacent to tributaries will have significant adverse effects on water quality and the aquatic ecosystem and will undermine achievement of the legislated goal of the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C.1251.

ARGUMENT

I. BECAUSE WETLANDS ADJACENT TO TRIBUTARIES PERFORM FUNCTIONS ESSENTIAL TO MAINTENANCE OF WATER QUALITY AND THE AQUATIC ECOSYSTEM, THEY ARE "INSEPARABLY BOUND UP" WITH THE INTEGRITY OF ADJACENT AND DOWNSTREAM WATERS.

In upholding regulation of wetlands in *Riverside Bayview*, the Court relied upon Congressional findings that pollution must be controlled at the source in order to achieve the Act's goals "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Congress recognized that water "moves in hydrologic cycles" such that "it is essential that discharge of pollutants be controlled at the source." S. REP. NO. 92-414, p. 77 (1972). The "integrity" sought to be restored and maintained, 33 U.S.C. § 1251, "refers to a condition in which the natural structure and function of ecosystems [are] maintained." H. REP. NO. 92-911, p. 76 (1972).

Science validates the understanding of Congress, the Corps, and this Court. It demonstrates that the failure to protect and maintain wetlands adjacent to "non navigable tributaries" will result in degradation of not only millions of miles of these important waters but also degradation of traditional navigable waters to which these tributaries contribute their flow. To date, fortunately, regulation of wetlands under the Act has done much to minimize their destruction and the attendant degradation of water quality and diminishment of aquatic integrity. The rate of loss of the nation's wetlands has declined from 458,000 acres per year during the two decades preceding enactment of the Clean Water Act to 58,500 acres

per year during the most recent assessment period.[2] Most of the substantial reduction in wetland loss can only be attributed to enactment and implementation of the wetland protection provisions of the Clean Water Act.

Below, we document four related scientific points. First, adjacent wetlands are a well-defined component of the aquatic environment with highly distinctive hydrologic features. Second, these distinctive features give rise to a unique suite of functions that directly contribute to the quality of other waters. Third, and most critically, science demonstrates that these wetlands help maintain water quality not just in nearby tributaries, but in navigable waters downstream. Fourth, it is reasonable to conclude adjacent wetlands separated from other waters by a man-made berm perform functions important to maintenance of water quality in the adjacent and downstream waters.

A. Adjacent Wetlands Are Distinct Features on the Landscape With Water Quality Functions Broadly Recognized in Science.

Adjacent wetlands lie at the interface between other surface waters, such as rivers and lakes, and terrestrial or upland systems. Wetland hydrology, or patterns of inundation or saturation by water, is the driving force that defines a wetland and controls its distinctive soil characteristics and plants. Hydrology is the key factor in the federal regulatory definition of a wetland:

> The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to

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[2] U.S. FISH & WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986-1997, 9 (2000).

> support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 C.F.R. § 328.3(b).[3] The recurrent inundation or saturation at or near the surface creates the unique environmental conditions that result in the important functions wetlands provide in the aquatic ecosystem – functions that scientific literature has linked to maintaining water quality in adjacent and downstream waters. These are not, in other words, occasional wet spots.

As concluded by the National Research Council of the National Academy of Sciences, "[w]etlands have strong connections to adjacent uplands and deepwater environments. The interdependence between wetlands and associated aquatic ecosystems provides strong scientific justification for policies that make a connection between clean water and the protection of wetlands."[4]

B. Adjacent Wetlands Have Critical Water Quality and Ecological Functions.

Adjacent wetlands perform several functions essential to maintenance of water quality and the chemical, physical and biological integrity of the aquatic ecosystem, including water storage, nutrient transformation and removal, sediment trapping, and provision of habitat for aquatic organisms.

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[3] Hydrology is also the primary factor in the definition of "wetland" proposed by the National Research Council of the National Academy of Sciences in 1995. NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, COMM. ON CHARACTERIZATION OF WETLANDS, WETLANDS: CHARACTERISTICS AND BOUNDARIES 3 (1995).

[4] *Id.* at 34.

1. Water Storage and Flow Moderation.

Wetlands store surface water following precipitation events and moderate the flow of adjacent and downstream waters. Short-term surface water storage in wetlands reduces downstream flood peaks following precipitation events. Excessive flood peaks result in destructive scouring of stream beds and channels which can harm aquatic life. In the northeastern United States, watersheds with 4% or greater wetlands had peak flows that were 50% lower than watersheds with no remaining wetlands.[5] Long-term surface water storage in wetlands maintains the base flow and seasonal flow distribution in adjacent streams. Wetlands in the adjacent landscape slowly release stored water through surface and sub-surface connections and "recharge" the streams maintaining flow during periods of low precipitation.[6]

2. Nutrient Transformation and Removal.

Wetlands play a critical role in limiting excessive nutrients in water because they intercept, transform, and accumulate nutrients (nitrogen and phosphorus) that would otherwise be delivered directly to streams or other waters by precipitation and runoff. All scientific studies conclude that wetlands are a major sink of pollutant nitrogen in the landscape, and some recent studies suggest that wetlands may be the most important sink.[7]

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[5] NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 48 (2001).

[6] T.C. WINTER, U.S. GEOLOGICAL SURVEY CIRCULAR, GROUNDWATER AND SURFACE WATER: A SINGLE RESOURCE, 1139 (1999).

[7] NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, CLEAN COASTAL WATERS: UNDERSTANDING AND REDUCING

A recent study of five wetlands (size 0.4-3.1 hectares) in southwestern Michigan found even these relatively small wetlands removed nitrate and sulfate from introduced water containing those pollutants at a rapid rate: "The rapid rates of [nitrate and sulfate] removal demonstrate how very small areas of wetland sediment are capable of improving water quality, and such areas often occur at critical points of water flow between surface and groundwater reservoirs."[8]

Wetlands reduce nitrogen pollution in surface waters by converting polluting forms of nitrogen into harmless gaseous form in a process called denitrification. It is the hydrology, or recurrent saturation or inundation, of a wetland that creates the conditions that make wetlands ideal for denitrification. Denitrification occurs under anoxic (without oxygen) soil conditions, but oxic (with oxygen) soils may be important in processing nitrogen first! Inundation or saturation of the soil with water limits oxygen except in the upper level of the soil and along some plant roots, creating an interface of oxic and anoxic soil conditions ideal for denitrification. Since some forms of nitrogen are highly mobile in groundwater, wetlands that do not have a surface hydrologic connectivity but have a subsurface groundwater connection can be important to reducing nitrogen pollution to nearby surface waters.[9] While other ecosystems provide some denitrification, only wetlands

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THE EFFECTS OF NUTRIENT POLLUTION (2000); R.W. Howarth, et al., *Sources of Nitrogen Pollution to Coastal Waters of the United States*, 25 ESTUARIES 656-676 (2002); Van Breemen, et al., *Where Did All the Nitrogen Go? Fate of Nitrogen Inputs to Large Watersheds in the Northeastern USA*, 57&58 BIOGEOCHEMISTRY 267-293 (2002).

[8] S.L. Whitmire & S.K. Hamilton, *Rapid Removal of Nitrate and Sulfate in Freshwater Wetland Sediments*, 34 J. ENVIRON. QUALITY 2062, 2070 (2005).

[9] NAT'L RESEARCH COUNCIL, *supra* note 7.

have this tremendous capacity to intercept and remove nitrogen, thus maintaining the water quality of adjacent and downstream waters.

In fact, scientists believe that wetlands adjacent to smaller tributaries in the upper reaches of watersheds "may be the most important regulating water chemistry in large drainages because their large surface-to-volume ratios favor rapid nitrogen uptake and processing."[10] Once water reaches larger rivers, the nitrogen in the water is less likely to come into contact with soils and vegetation, so it is critical to water quality that excessive nitrogen be filtered in wetlands adjacent to smaller tributaries.[11] In a given watershed, smaller tributaries and associated wetlands may process more nitrogen and retain more large sediment particles while wetland floodplains associated with larger downstream rivers retain phosphorous and trap fine particles. Wetlands thus may be needed both upstream and downstream to fully address problems of nitrogen and phosphorus in surface waters.

3. Sediment Trapping.

Wetlands adjacent to streams and other waters are generally depositional areas on the landscape. Soil erodes from the adjacent upland areas "downhill" into the wetland. Adjacent wetlands intercept and trap eroding soil and sediment from uplands preventing delivery to the stream or other water body. Sediment adversely affects water quality by smothering

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[10] Peterson, et al., *Control of Nitrogen Export From Watersheds by Headwater Streams*, 292 SCIENCE 86-90 (2001).

[11] D.F. Whigham, et al., *Impacts of Freshwater Wetlands on Water Quality: A Landscape Perspective*, ENVIRONMENTAL MANAGEMENT, 663-671 (1988).

streambeds and destroying or degrading aquatic habitat.[12] In addition, toxic materials including pesticides, industrial wastes, and metals can be bound to sediment and carried into water bodies.[13] States report that sedimentation is one of the most widespread pollutants of streams and rivers and impairs 12% of assessed stream miles and 31% of the impaired stream miles.[14]

4. Habitat for Aquatic Organisms.

Wetlands provide the only habitat for numerous organisms and are important to the overall maintenance of biodiversity and the aquatic ecosystem. Similarly, tributaries provide different physical habitat for different kinds of aquatic species and different lifestages of certain fish species. Most fish require different physical habitats for each life stage, so that connectivity of diverse habitats including perennial, intermittent, ephemeral, and headwater streams is important to the fish finding suitable habitats during reproduction and each critical life stage.[15, 16, 17]

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[12] U.S. ENVT'L PROTECTION AGENCY, NATIONAL WATER INVENTORY REPORT 13 (2000) (Report to Congress).

[13] W.R. Osterkamp, et al., *Economic Considerations of a Continental Sediment-Monitoring Program*, 13 INTERNATIONAL JOURNAL OF SEDIMENT RESEARCH No. 4: 12-24 (1998).

[14] U.S. ENVT'L PROTECTION AGENCY, *supra* note 12, at 12.

[15] T.R. Labbe & K.D. Fausch, *Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales*, 10(6) ECOLOGICAL APPLICATIONS 1774-1791 (2000).

[16] M.N. Paller, *Relationships Between Fish Assemblage Structure and Stream Order in South Carolina Coastal Plain Streams*, 123 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 150-161 (1994).

Headwaters are essential breeding habitat for some species of fish.[18]

C. Wetlands Adjacent to Tributaries Have Functions Important to Maintaining Water Quality in Traditionally Navigable Water Bodies.

Numerous scientific studies have documented and described the functions of wetlands in relation to adjacent waters and downstream waters. Functions of a wetland are associated with its landscape position.[19] Most of a surface water drainage network's interface with the land occurs in streams and associated wetlands at the most upper or "headwater" extent of the watershed. In most landscapes, approximately 75% percent of the stream length of a surface water drainage network consists of first order streams (no tributaries) and second order streams (where two first order streams join). These headwater tributaries and adjacent wetlands are "first responders" to the discharge of pollutants generated by activities in uplands. The most obvious reason even small tributaries and adjacent wetlands play a critical water quality function is that the great majority of water passes through them on the way downstream.

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[17] I.J. Schlosser, *Critical Landscape Attributes That Influence Fish Population Dynamics in Headwater Streams,* 303 HYDROBIOLOGIA 71-81 (1995).

[18] J.L. Meyer & J.B. Wallace, *Lost Linkages and Lotic Ecology: Rediscovering Small Streams*, ECOLOGY: ACHIEVEMENT AND CHALLENGE 302 (M.C. Press et al. eds., 2001).

[19] See M.M. BRINSON, A HYDROGEOMORPHIC CLASSIFICATION FOR WETLANDS, Technical Report WRP-DE-4, (U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS, 1993).

While first and second order tributaries constitute most of a surface drainage system, no generalizations can be made about proximity of first or second order tributaries to navigable waters. In some cases, first order tributaries may be many miles from the nearest navigable water. In other cases, first order tributaries may empty directly into navigable waters. Consequently, no generalizations can be made about the relative function of first or second order tributaries and associated wetlands with respect to downstream water quality based on their proximity to the downstream waters.

The Carabell wetlands are adjacent to a ditch excavated in wetlands. Ditches are typically excavated to modify the natural drainage characteristics of a site to increase the rate of flow from the site by decreasing surface and subsurface water retention. A large percentage of the nation's streams and wetlands have been channelized or ditched. Ditches connected to other waters function as tributaries by conveying water, and any pollutants contained in that water, to downstream water bodies.

The water quality maintenance functions of wetlands adjacent to tributaries extend hundreds of miles downstream to the larger waters to which the tributaries contribute flow. Nutrient control provides a paradigmatic example. Pollution from excessive nutrients is a significant problem in coastal waters including Chesapeake Bay, Albemarle and Pamlico Sounds in North Carolina, and the Gulf of Mexico.[20] Large additions of nutrients, including nitrogen, into such waters causes an overgrowth of algae and subsequent depletion of oxygen in the water, a process called eutrophication.

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[20] The degradation of coastal estuaries prompted Congress to amend the Clean Water Act to establish a national estuary program to develop comprehensive conservation and management plans to implement corrective actions to address pollution of estuaries. *See* 33 U.S.C. 1330.

"Eutrophication accounts for about half of the impaired lake area and 60% of the impaired river reaches in the U.S. and is also the most widespread pollution problem of U.S. estuaries."[21] Much of the excessive nutrient loading of coastal waters and estuaries is delivered by upstream tributaries from sources in watersheds that can be long distances from the coastal zone.[22]

The notorious "dead zone" in the Gulf of Mexico illustrates just how serious the problem can become, and how wetlands are integral to solving it. Nutrient laden waters from the Mississippi River seasonally create a large area of oxygen-depleted water, referred to as hypoxia, in the Gulf of Mexico on the Louisiana continental shelf. Excessive nutrients contribute to algal production which in turn leads to increased availability of organic carbon and depletion of oxygen in the water column. Most aquatic species cannot survive in oxygen depleted water – yet this hypoxia occurs in the middle of the most important commercial and recreational fisheries in the conterminous United States.[23] Significantly for present purposes, some *eighty-six percent* of nitrogen arriving at the hypoxic zone originates in the upper Mississippi River basin above the confluence with the Ohio

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[21] Carpenter, et al., *Nonpoint Pollution of Surface Water with Phosphorus and Nitrogen*, 3 ISSUES IN ECOLOGY 1-12 (1998).

[22] NAT'L RESEARCH COUNCIL, *supra* note 7; R. Howarth, et al., *Nutrient Pollution of Coastal Rivers, Bays, and Seas*, 7 ISSUES IN ECOLOGY 1-15 (2000).

[23] See N.N. Rabalais, et al., *Characterization of Hypoxia, Topic 1 Report for the Integrated Assessment of Hypoxia in the Gulf of Mexico* (U.S. Dep't. of Commerce, Nat'l Oceanic and Atmospheric Admin. (1999)), http://oceanservice.noaa.gov/products/pubs_hypox_t1final.pdf

River.[24] The National Oceanic and Atmospheric Administration has identified restoration of wetlands in the Mississippi River watershed as a strategy to address hypoxia in the Gulf based on the nutrient removal functions wetlands provide in the upper Mississippi River tributaries.[25] Although its watershed is located hundreds of miles from the Gulf, "the Illinois River basin, with 7% of its watershed converted to wetland, could reduce about 50% of the 144,000 metric tons/yr of nutrients it generates, or about 5% of the entire nitrogen load to the gulf of Mexico."[26]

D. Wetlands Neighboring, Bordering, or Contiguous to Other Waters Usually Have Significant Functional Relationships to the Adjacent Waters Notwithstanding Natural or Man-Made Berms or Similar Barriers.

The water quality and other functions of adjacent wetlands for downstream water bodies are only partially removed, if removed at all, by construction of levees or berms. Natural river levees are formed on most large meandering rivers and consist of linear elevated lands along the river bank often separating the river from wetland areas or "backswamps."

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[24] D.A. Goolsby, et al., *Flux and Sources of Nutrients in the Mississippi – Atchafalaga River Basin: Topic 3 Report for the Integrated Assessment on Hypoxia in the Gulf of Mexico*, (U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin.(1999)), http://www.nos.noaa.gov/Products/hypox_t3final.pdf.

[25] W.J. Mitsch, et al., *Reducing Nutrient Loads, Especially Nitrate-Nitrogen, to Surface Water, Ground Water, and the Gulf of Mexico, Topic 5 Report for the Integrated Assessment on Hypoxia in the Gulf of Mexico* 84 (U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin. (1999), http://oceanservice.noaa.gov/products/pubs_hypox.t5final.pdf

[26] *Id.*

These levees are formed by the deposition of sediment during flood stage as sediment laden water leaves the river channel, slows and spreads out, and drops its sediment load along the immediate river shoreline. The levee does not isolate the backswamp from the river as the levee is periodically overtopped by the river during flood stage such that backswamp wetland absorbs floodwaters, attenuates flows and receives pollutants such as sediment that would otherwise travel immediately downstream.[27] Similar man-made dikes or barriers usually do not isolate a wetland from all surface connection with adjacent waters. If water levels rise and overtop the dike or barrier, it results in a direct surface connection with the adjacent wetland.

Subsurface connections also can exist between wetlands and adjacent waters even where "separated" by surface features such as berms, dikes, or dunes. For example, studies show that beach dunes do not completely isolate a wetland from adjacent waters. Wetland dune swales along the immediate shoreline of the Great Lakes have direct subsurface hydrological connectivity to the adjacent lake and water tables in the wetland are controlled by lake levels.[28] Exchange of water between adjacent wetlands and a river is often through shallow groundwater, in both directions.[29]

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[27] W.J. Mitsch & J.G. Gosselink, 317-351 WETLANDS (1986).

[28] D. Albert, *Borne of the Wind: An Introduction to the Ecology of Michigan's Sand Dunes* (Michigan Natural Features Inventory 2000).

[29] See NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, RIPARIAN AREAS, FUNCTIONS AND STRATEGIES FOR MANAGEMENT 33 (2002) ("Because floodplains are porous and contain aquifers that are closely linked to and controlled by the channel system, waterbodies and their riparian areas are linked longitudinally, vertically and horizontally); *id.* at 34 (Figure 1-4 and legend describing how in most "alluvial river corridors" river water moves rapidly through surficial

Indeed, even where man-made levees are in place, hydrologic connectivity between wetlands and adjacent waterways persists.[30]

The direct subsurface connections between wetlands and adjacent waters can affect water quality despite surface features. As discussed above in I.B.2., excessive nitrogen is a major pollutant of surface waters. Because nitrogen is mobile in groundwater, wetlands separated from waters by dikes or berms may still perform important functions by reducing nitrogen conveyed to the adjacent water by subsurface connections.[31]

Failure to include wetlands as "adjacent" where immediate at-grade abutment is interrupted by natural or man-made landforms will eliminate federal protection over large expanses of wetland function. The U.S. Geological Survey has calculated that over ninety-percent (93%) of the lower Mississippi River floodplain has been modified by the

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alluvia in a hyporheic zone immediately underlying the stream bed and adjacent areas).
http://www.nap.edu/books/0309082951/html/33.html; Gerald J. Gonthier, *Ground-water-flow Conditions Within a Bottomland Hardwood Wetland, Eastern Arkansas*, 16 WETLANDS 334-46 (1996) (describing groundwater flow from wetland adjacent to Cache River in Arkansas to and from river).

[30] *See, e.g.*, Kelley, *Relations Among River Stage, Rainfall, Ground Water Levels, and Stage at Two Missouri River Flood-Plain Wetlands* (U.S. Geological Survey 2001) (describing water levels in floodplain wetlands separated from Missouri River by levees rising and falling as river heights (stages) varied).

[31] NAT'L RESEARCH COUNCIL, *supra* note 7.

presence of levees.[32] Many of the remaining wetlands are landward of those levees.

II. THE FEDERAL DEFINITION OF "ADJACENT" WETLANDS ACCURATELY REFLECTS THE CONNECTION TO ADJACENT AND DOWNSTREAM NAVIGABLE WATERS, AND THAT DEFINITION ENCOMPASSES THE RAPANOS AND CARABELL WETLANDS.

Given the demonstrated physical interconnections between wetlands, adjacent tributaries and navigable waters, Clean Water Act jurisdiction over wetlands adjacent to tributaries will serve to protect the biological, chemical and physical integrity of traditional navigable waters. The federal "adjacent" wetlands definition accurately reflects the known interrelation of such wetlands with navigable waters and thus further the aim of the Clean Water Act. Further, information in the record of these cases supports the conclusion that the *Rapanos* and *Carabell* wetlands qualify as regulated adjacent wetlands.

The federal regulation applied in these cases defines waters of the United States to include wetlands that are "adjacent" to traditional navigable waters or their tributaries. 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(s)(7). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring," *id.*, with the further provision that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c); 40 C.F.R. § 230.3(b). As discussed in Section I, *supra* at 14-17,

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[32] R.L. Delany & M.R. Craig, *Longitudinal Changes in Mississippi River Floodplain Structure* (U.S. Geological Survey 1997).

numerous studies demonstrate that wetlands bordering, contiguous, or neighboring tributaries have hydrological interconnections with those water bodies and with waters downstream, such that the water quality functions of those wetlands are effectively transmitted to navigable waters. The regulatory definition of adjacent wetlands accurately encompasses wetlands that are important to maintaining and protecting the integrity of waters of the United States.

Scientific understanding also supports the regulation's effective presumption that "man-made dikes or barriers, natural river berms, beach dunes and the like" do not operate to defeat the rationale for extending jurisdiction to wetlands that are "bordering, contiguous, or neighboring" to other waters, including tributaries. Wetlands and neighboring surface waters can interact through a variety of means, including surface flows caused by local wet weather events (e.g., rainwater causing overflow from a wetland into a tributary); surface flows caused by remote wet weather (e.g., upstream precipitation causing a tributary to flood into a wetland); and by flows that travel at least temporarily through the ground before discharging into the tributary.[33] Thus, even though adjacent wetlands may lack constant, obvious, or contiguous surface water connection to a nearby tributary, they can still possess significant hydrologic connectivity and functional linkage.[34]

Turning to application of the regulation, the Rapanos property includes three wetland areas, all with surface water connections through tributaries to traditionally navigable waters. *United States v. Rapanos*, 376 F.3d 629, 642-643 (6th Cir. 2004). As the Rapanos do not dispute that their wetlands have direct connections to tributaries, those wetlands fall

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[33] *See* Gonthier, *supra* note 29 (describing flow of water from wetland into local aquifer and then into river).

[34] *See id.*; Albert, *supra* note 34; Mitsch, *supra* note 27.

within the definition of adjacent wetlands. 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(s)(7).

The 19.6 acre Carabell property includes approximately 16 acres of forested wetlands that are a remnant of the once more expansive Lake St. Clair, which lies about one mile southeast of the tract. *Carabell v. United States*, 391 F.3d 704, 705 (6th Cir. 2004). At some time in the past, a ditch was excavated from the wetland and the spoil material cast along both sides of the ditch, creating a berm. 391 F.3d at 705. The ditch connects with the Sutherland-Oemig Drain which flows into Auvase Creek, which in turn flows into Lake St. Clair, a traditionally navigable water that connects to Lake Erie. JA Vol. 4 at 847 (Magistrate's Report and Recommendation).

The administrative record supports the conclusion that the Carabell wetlands are "adjacent" under federal regulation. The ditch was excavated out of wetlands contiguous to the delineated wetlands on the site, with removed wetland materials "sidecast" along the ditch to form the berm. JA Vol. 3 at 532. The record contains little clarifying information about this sidecast berm's manner or mode of construction, its size, or its actual demonstrated performance as a hydrological barrier between the wetlands, ditch, and drain, particularly during wet-weather events. Based on what was before it, however, the Corps concluded that the ditch remained adjacent to the wetlands from which it was dug for the purposes of its regulatory jurisdiction. JA Vol. 3 at 516, 523, 531-534. While the frequency and extent of surface water connection between the wetland and the neighboring tributaries is not clear from this record, what does appear clear is the fact that a periodic surface water connection exists.[35] The record also presents evidence of subsurface

[35] The Carabells' attorney stated that "at least" three "lateral cuts, drainage cuts that run through the berm," through which rainwater could "go over," JA Vol. 3 at 639, while another

connection between the wetlands and ditch.[36] The hydrologic connectivity between the Carabell wetlands and nearby tributaries supports the Corps' conclusion that water quality functions could be lost if these wetlands were destroyed. *Compare* JA Vol. 3 at 519 (Corps determination stating wetlands on site provide "valuable seasonal habitat for aquatic organisms" and "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair.") *with* Section I, *supra* at 6-11 (discussing water storage, pollution reduction and biological habitat values of wetlands for navigable waters).

CONCLUSION

Peer-reviewed scientific studies demonstrate that wetlands adjacent to tributaries are functionally interrelated with, and physically interconnected to traditionally navigable waters, and play an important role in restoring and maintaining "the chemical, physical, and biological integrity of the Nation's

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Carabell consultant objected to the proposition that the existing wetlands were essentially "offline" with "no outflow," stating that a three-and-a-half-inch rain would result in "some overflow." JA Vol. 3 at 639.

[36] The Carabells' consultant stated that that the Sutherland-Oemig "drain dropped the water table three, four feet, so it has been a long slow drying out process, and I'm not so sure that that process isn't continuing today." JA Vol. 3 at 629 (statement of Mr. Leighton). And the Corps' site inspector, addressing the question of "Site Hydrology" and the nearest water receiving runoff from the site, answered "perhaps drain, perhaps groundwater discharge." JA Vol. 3 at 487. *See also United States v. Deaton*, 332 F.3d 698, 702-703 (4th Cir. 2003) (discussing drainage ditch dug in wetlands with sidecasting as increasing drainage with a purpose to "destroy wetland characteristics").

waters." 33 U.S.C. § 1251. Federal regulations defining waters of the United States to include those wetlands accordingly have a sound foundation in science. Those regulations, applied to the wetlands in this case, support federal jurisdiction in both *Carabell* and *Rapanos*. The decisions below should be affirmed.

Respectfully submitted.

JAMES BLANDING HOLMAN, IV*
DERB S. CARTER, JR.
SOUTHERN ENVIRONMENTAL
LAW CENTER
200 W. Franklin Street, St. 330
Chapel Hill, NC 27516
(919) 967-1450

**Counsel of Record*

(22) (18)

Consolidated Cases Nos. 04-1034, 04-1384

IN THE

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JOHN A. RAPANOS, *et al.*,

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v.

UNITED STATES OF AMERICA,

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UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ENVIRONMENTAL LAW INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENTS

LESLIE CAROTHERS
JAY E. AUSTIN
D. BRUCE MYERS JR.
LISA GOLDMAN
ENVIRONMENTAL LAW INSTITUTE
2000 L Street, N.W.
Washington, DC 20036
(202) 939-3800

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
JAMES R. WRATHALL
CAREY BOLLINGER
RACHEL Z. STUTZ
TODD HETTENBACH
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

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INTEREST OF AMICUS CURIAE

The Environmental Law Institute (ELI) is an independent, nonpartisan education and policy research center dedicated to environmental protection through improved environmental law and governance.[1] Over 3,000 environmental professionals from law firms, government, industry, public interest organizations, and academia support ELI through its Associates Program.

Founded in 1969, at the dawn of the modern era of environmental law, ELI has long been a leader in the areas of water quality and wetlands protection. ELI has undertaken extensive research (often at the request of the U.S. Environmental Protection Agency or the U.S. Army Corps of Engineers) to promote innovative and cost-effective legal and policy approaches. In particular, ELI has exhaustively studied and reported on aspects of the collaborative federal-state framework that governs wetlands conservation. Since 1979, ELI has published the *National Wetlands Newsletter*, now the preeminent journal on wetlands policy. ELI has actively participated in the implementation of the Clean Water Act since its enactment in 1972.

ELI has concluded from its long-standing involvement in wetlands law and policy that the current comprehensive federal program is absolutely essential to the health of our Nation's waters. Because of the profound threat these cases pose to the framework established by Congress to protect water resources nationwide, ELI for the first time in its 36-year history is participating in judicial proceedings as an *amicus curiae*.

STATEMENT OF THE CASE

In these consolidated cases, the U.S. Court of Appeals for the Sixth Circuit upheld federal Clean Water Act jurisdiction over (a) wetlands sharing a surface water connection

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity, other than *amicus* and its counsel, made any monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

with tributaries of navigable-in-fact waterways[2] (*Rapanos*) and (b) wetlands separated from such tributaries only by a man-made berm (*Carabell*). Both cases involve "adjacent wetlands" under regulations promulgated by the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 of the Clean Water Act (Act). Section 404 does not prohibit all filling of wetlands; rather, it requires that a permit be obtained prior to any filling, setting forth reasonable protection and mitigation measures. Permits are liberally granted by the Corps, and most smaller projects are permitted by rule rather than by individual applications.

The Sixth Circuit held in these cases that the Corps reasonably interpreted "waters of the United States" to encompass wetlands adjacent to tributaries of navigable-in-fact waters, including the wetlands that petitioners here proposed to fill. These decisions were based on the plain language, express purpose, and legislative history of the Clean Water Act as construed in the unanimous decision of this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*). There, as in the cases below, "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands" reflected a nexus sufficient to confer statutory jurisdiction to protect the adjacent wetlands. *Id.* at 134.

The Sixth Circuit's decisions also were in full accord with this Court's opinion in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), which held that the Clean Water Act did not extend to abandoned gravel pits where the sole basis for jurisdiction was their use by migratory birds. *Id.* at 171-172. Unlike the isolated ponds addressed in *SWANCC*, the types of adjacent wetlands addressed in

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[2] *Amicus* uses the terms "navigable-in-fact" and "traditional navigable waters" to connote waters that are actually navigable or are susceptible to being so made. The term "navigable waters," as used in the Clean Water Act, is defined to mean "waters of the United States" and is a more comprehensive term of art that includes waters that are not navigable-in-fact. *See* 33 U.S.C. § 1362(7).

these cases have physical, biological, and chemical connections with navigable-in-fact waters that bring them within the "waters of the United States" covered by the Act. Because the statutory question is conclusively resolved under this Court's prior decision in *Riverside Bayview*, the primary issue of law presented in these cases is whether jurisdiction to protect adjacent wetlands is within the power granted to the federal government under the Commerce Clause of the U.S. Constitution.

SUMMARY OF ARGUMENT

I. Congress intended to include within "waters of the United States" those wetlands that have functional connections sufficient to affect the "chemical, physical, and biological integrity" of our Nation's waters. *See* 33 U.S.C. § 1251(a). As the Court held in *Riverside Bayview*, the Corps' regulations broadly interpreting "waters of the United States" to encompass adjacent wetlands were reasonable and were ratified by Congress in the 1977 Clean Water Act Amendments. 474 U.S. at 132-133, 137. The Court again should defer to the judgment of the Corps, which reasonably has determined that the categories of adjacent wetlands at issue here are within the scope of jurisdiction intended by Congress under the Act. Petitioners' arguments that Congress intended to limit jurisdiction only to wetlands abutting or directly flowing into traditional navigable waters conflict with Congress's express legislative purpose and with the Corps' administrative construction of the Act that Congress acquiesced to in 1977. *Id.* at 137.

SWANCC does not support a contrary conclusion. Unlike the isolated ponds in *SWANCC*, the Corps' jurisdiction over adjacent wetlands that have functional connections with traditional navigable waters is necessary to protect and maintain the chemical, physical, and biological integrity of the waters of the United States, as Congress mandated under the Act.

II. Congress has Commerce Clause authority to protect wetlands adjacent to navigable-in-fact waters and their tributaries. The power to protect navigability is a funda-

mental attribute of federal authority under the Commerce Clause, and adjacent wetlands provide critical flood-control functions that are vital to ensure continued navigability of our Nation's waters. *See, e.g., Oklahoma ex rel. Phillips* v. *Guy F. Atkinson, Co.*, 313 U.S. 508, 525 (1941). Commerce Clause authority over adjacent wetlands also is necessary to protect traditional navigable waters against pollution and similar injuries. Jurisdiction over wetlands that have a surface water connection through tributaries to navigable-in-fact waters (as the wetlands in *Rapanos* do) is plainly important to this end. Even where the hydrological connection may be altered by a man-made berm (as in *Carabell*), adjacent wetlands absorb water and sequester pollutants that would otherwise flow into tributaries and traditional navigable waters. Federal jurisdiction does not depend on a showing in each case that alteration or destruction of a particular wetland poses a threat to particular navigable-in-fact waters. Congress has the power to adopt, and to delegate to the Corps the power to adopt, rational rules giving the Corps the jurisdiction generally necessary to protect navigable waters. The Corps then may constitutionally assert such jurisdiction without a showing of a specific threat in each particular case.

Congress has constitutional power to regulate destruction and pollution of adjacent wetlands for the additional reason that these are economic activities that have substantial effects on interstate commerce. *See, e.g., Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Clean Water Act regulates economic activities, and the activities regulated in these cases—filling of wetlands for commercial development—are inherently economic. The *Rapanos* petitioners planned to construct a shopping center and build roads on the wetlands; the *Carabell* petitioners planned to construct a large, multi-family condominium development. It is manifestly rational to conclude that the pollution and destruction of wetlands resulting from these types of economic activities have substantial effects on interstate commerce. The issue is not whether these effects can be shown in each instance in which jurisdiction is asserted, but whether the class of ac-

tivities, rationally defined, has a substantial effect in the aggregate. Moreover, the Corps' "adjacent wetlands" regulation is a critical component of the Clean Water Act's comprehensive regulatory scheme that, if narrowed, would nullify Congress's purpose. *See Raich*, 125 S. Ct. at 2209.

III. Federal jurisdiction over adjacent wetlands is necessary to the federal-state framework that Congress has enacted and it is wholly consistent with principles of federalism. To address the national problem of protecting water resources, Congress determined that minimum federal standards and oversight are necessary. Congress provided for the States to play a primary role in implementing the federal wetlands program if they so choose. But Congress did not, as petitioners argue, *divide* jurisdiction between the federal and state governments based on the proximity of wetlands to navigable-in-fact water. Nor is there a basis for petitioners' arguments that wetlands protection is a form of land use regulation intruding on States' traditional powers. Historically, most States have not regulated wetlands, and in any case this Court has long upheld the primary role of the federal government in preserving environmental resources. Comprehensive federal jurisdiction here is wholly consistent with principles of federalism as articulated by our Nation's founders, who recognized that the federal government must be and is empowered to address problems that can only be solved at the national level.

ARGUMENT

Wetlands are critical to the health of traditional navigable waters and are of great value to the people who depend upon these waters for their livelihoods. Wetlands filter and purify water, absorb floodwaters, serve as storm buffers, provide habitat for economically valuable fish and riparian wildlife, and recharge groundwater supplies.

If the Clean Water Act is to remain effective, the jurisdictional definition of "waters of the United States" must be understood, as Congress intended, to include not only traditional navigable waters and their tributaries, but also the wetlands that protect and enhance them—whether those

wetlands directly abut such waters or otherwise have functional connections with them. Whereas wetlands were once viewed as "bogs" and "swamps" suitable only for draining or filling, improved scientific understanding of their ecological and economic value has informed Congress's determination that they must be protected under the Act. From the mid-1950s to the mid-1970s, an estimated 550,000 acres of wetlands were lost *per year* in the continental United States. The decade following passage of the Act saw this rate cut in half,[3] and as of 2001, the rate of loss stood at only 60,000 acres per year.[4]

Petitioners' arguments against federal jurisdiction in these cases would, if adopted by the Court, defeat Congress's intent in passing the Clean Water Act. Petitioners ask the Court to draw an arbitrary line for federal jurisdiction that would include only wetlands physically abutting or directly flowing into traditional navigable waters. Such a line would be ineffective and has no basis in the statute. It would exclude the vast majority of critically important wetlands from coverage under the Act—making them immediately vulnerable to destruction or pollution. Wetlands across the country could again be lost at an accelerated rate, leaving navigable waterways more polluted, rendering populations more susceptible to flooding, reducing the sustainability of economically valuable fisheries and wildlife, and potentially jeopardizing drinking water supplies.

Moreover, the jurisdictional provisions at issue in these cases are the foundation for all of the Clean Water Act programs, including the regulation of "point source" discharges of industrial pollution. If, as petitioners seek, this Court an-

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[3] Thomas E. Dahl & Gregory J. Allord, *History of Wetlands in the Conterminous United States*, United States Geological Survey Water Supply Paper 2425, *available at* http://water.usgs.gov/nwsum/WSP2425/history.html (last modified Mar. 7, 1997).

[4] United States Environmental Protection Agency, *Threats to Wetlands*, Office of Wetlands, Ocean & Watersheds, EPA 483-F-01-002d (Sept. 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/threats.pdf.

nounces new limitations on the scope of the Act, essentially re-dividing jurisdiction between federal and state governments, it would become impossible to achieve the comprehensive restoration of our Nation's waters that Congress intended. And a holding by this Court that Congress is powerless under the Constitution to protect the wetlands in these cases would call into question the validity of other decades-old environmental laws, also enacted under Congress's Commerce Clause authority, that protect clean air, drinking water, endangered species, and other natural resources.[5] There is, however, no valid basis for any such holding, as we now explain.

I. "WATERS OF THE UNITED STATES" PROTECTED BY THE CLEAN WATER ACT INCLUDE ADJACENT WETLANDS WITH FUNCTIONAL CONNECTIONS TO TRADITIONAL NAVIGABLE WATERS

A. Scope And Purposes Of The Clean Water Act

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Prior to 1970, responsibility for regulation of water pollution had largely been left to state and local authorities. *See Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981). By 1972, however, water pollution had become a national crisis; the state-led system proved to be "ineffective," *id.*, and "inadequate in every vital aspect," S. Rep. No. 92-414 (1972), at 7, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674, *cited in Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981). In response, Congress "establish[ed] an all-encompassing program of water pollution regulation," applicable to "virtually all bodies of water." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492 (1987) (citing *Milwaukee*, 451 U.S. 304). Congress recognized that protection of the integrity of aquatic ecosystems demanded broad fed-

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[5] *E.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7671q; Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26; Endangered Species Act, 16 U.S.C. §§ 1531-1544.

eral authority to control pollution, stating: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77 (1972).

To this end, Congress redefined the phrase "navigable waters," which had been used in prior water pollution laws, to extend to all "waters of the United States," 33 U.S.C. § 1362(7). This redefinition reflected Congress's intent to include within federal jurisdiction some non-navigable waters. *See Riverside Bayview*, 474 U.S. at 133; *see also Natural Res. Def. Council* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (Congress intended to extend jurisdiction over the Nation's waters to "the maximum extent permissible under the Commerce Clause of the Constitution."). As this Court held in *Riverside Bayview* with respect to the same category of "adjacent wetlands" at issue here, Congress acquiesced in this expansive definition of federal jurisdiction when it passed extensive amendments to the Clean Water Act in 1977. 474 U.S. at 136-138.

Congress's intention to protect *all* U.S. waters—including wetlands—is properly reflected in the Corps' "adjacent wetlands" regulations. The Corps defines "waters of the United States" to include not only traditional navigable waters and their tributaries, *see e.g.*, 33 C.F.R. § 328.3(a)(1)-(4),(5), but also "[w]etlands adjacent to" any such waters, *id.* § 328.3(a)(7). The regulations clarify that federal jurisdiction is not defeated by the presence of obstructions that "separate" wetlands from otherwise adjacent waters: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c). Petitioners do not seriously dispute that all the wetlands in these cases fall within the Corps' regulatory definition and thus require a Section 404 permit as long as the regulations themselves are valid.

The Corps does not, as petitioners contend, seek to regulate all aspects of the hydrological cycle. Petitioners and their *amici* attempt to portray the Corps as an over-

zealous agency run amok, but the facts demonstrate otherwise. Not only is the Corps' jurisdiction constrained by the regulatory definition of "waters of the United States," the Corps also exercises discretion through the Section 404 permitting process. Although the Corps received an average of 74,500 Section 404 permit requests each year from 1996 to 1999, a mere three-tenths of one percent (0.3%) were denied.[6] Thus, claims that the Corps overreaches under Section 404 are belied both by the regulatory limitations and, empirically, by the high percentage of permits the Corps grants.

B. The Adjacent Wetlands In These Cases Are "Waters Of The United States" Under *Riverside Bayview* And *SWANCC*

As this Court held in *Riverside Bayview*, the Corps acted pursuant to clear statutory authority in promulgating its "adjacent wetlands" regulations. 474 U.S. at 135. *Riverside Bayview* is controlling with respect to the statutory interpretation issues in these cases. Petitioners have not offered any basis in the statute to exclude their adjacent wetlands from federal protection. Like the adjacent wetlands in *Riverside Bayview*, the wetlands in these cases are functionally connected to navigable-in-fact waters or their tributaries and thus fall within the clear reach of the Clean Water Act.[7]

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[6] *See EPA's Clean Air Budget and the Corps of Engineers Wetlands Budget: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 106th Cong., at 2 (2000) (testimony of Michael Davis, Deputy Assistant Secretary of the Army for Civil Works).

[7] Petitioners' *amici* claim these cases are really about "ditches," not wetlands and tributaries, and "point sources" rather than "waters of the United States," arguing that under the Corps' 1975 interim regulations wetlands connected to traditional navigable waters by conveyances such as ditches were not intended to be subject to federal protection. *See* Br. of Amici Curiae Foundation for Environmental and Economic Progress *et al.* in Support of Petitioners 21-22. However, the Corps' 1975 interim regulations did not use these terms in the obtuse manner urged by *amici*. To the contrary, those regulations provided that even wetlands *not* directly

This functional relationship corresponds with the purpose of the Act. Wetlands maintain the *physical integrity* of downstream waters by providing important flood control and storm buffer functions. For example, the substantial impacts of Hurricane Katrina on the navigable waters of Louisiana and Mississippi in August 2005 were due in part to the extensive loss of wetlands that has occurred on the Gulf Coast.[8] Adjacent wetlands also maintain the *chemical integrity* of downstream waters by filtering and removing excessive nutrients and other pollutants that today threaten the existence of major interstate ecosystems such as the Great Lakes and the Chesapeake Bay. Finally, wetlands, including adjacent wetlands, play a critical role in ensuring the *biological integrity* of downstream waters by supporting the growth of plants and animals that form the basis of the aquatic food chain and providing habitat for fish that spawn in wetlands and move to open waters later in life.[9]

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adjacent or contiguous to traditional navigable waters or their tributaries could come within the Corps' jurisdiction where necessary for the protection of water quality. 40 Fed. Reg. 31325 (codifying 33 C.F.R. § 209.120(d)(2)(i)). Read as a whole, the Corps' regulations offer no support for *amici's* narrow construction. There is no reason that a water may not be *both* a "point source" and a "water of the United States" under the Act. Moreover, Congress's intent to address *all* sources of pollution that impair navigable waters was reaffirmed in the Water Quality Act of 1987, which further amended the Clean Water Act and established a comprehensive program for regulating discharges of storm water run-off. *See* 33 U.S.C. § 1342(p).

[8] *See* Tim Hirsh, *Katrina Damage Blamed on Wetland Loss, available at* http://news.bbc.co.uk/2/hi/americas/4393852.stm (last updated Nov. 1, 2000).

[9] Indeed, given the critical importance of wetlands to downstream waters, every Administration since 1989 has adopted an express policy of "no net loss" of wetlands—a policy recently expanded to include an "overall increase" of wetlands on a national basis. *See, e.g., Fact Sheet: President Announces Wetlands Initiative on Earth Day* (2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040422-1.html. This policy is implemented primarily through the § 404 permitting program. Comprehensive federal jurisdiction over wetlands as waters of the United States is absolutely essential to meet this national goal.

The broad scope of Clean Water Act jurisdiction over adjacent wetlands affirmed by the Court in *Riverside Bayview* was not affected by this Court's holding in *SWANCC*. There, the Court expressly recognized that waters are subject to federal jurisdiction where they have a "significant nexus" with traditional navigable waters, and that in 1977 Congress acquiesced in the Corps' broad authority over filling of adjacent wetlands as necessary to protect traditional navigable waters. 531 U.S. at 170-171 (citing *Riverside Bayview*, 474 U.S. at 136). *SWANCC* rejected the Corps' assertion of jurisdiction over an abandoned, water-filled mining site located wholly within Illinois where the only basis for jurisdiction was its use by migratory birds—because there was *no* connection with traditional navigable waters or their tributaries. Unlike the isolated ponds in *SWANCC*, the type of wetlands here have important functional connections to, and resulting impacts on, traditional navigable waters.

C. The Court Should Defer To The Corps' Interpretation

The Court established in *Riverside Bayview* that Congress intended, at a minimum, that jurisdiction under the Act cover wetlands abutting traditional navigable waters. 474 U.S. at 137. To the extent that any ambiguity remains about whether the Act reaches wetlands adjacent to *tributaries* of traditional navigable waters, this Court should defer to the Corps' interpretation of the Act, just as it did in *Riverside Bayview*. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Id.* at 131; *see Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) (it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

The Corps' conclusion that wetlands adjacent to tributaries of navigable-in-fact waters and wetlands separated from such tributaries only by a man-made berm are jurisdictional is well supported and reasonable. As this Court noted in *Riverside Bayview*:

> [W]etlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, *see* 33 C.F.R. § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, *see* § 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i).

474 U.S. at 134-135. Here, as in *Riverside Bayview*, it was reasonable for the Corps to conclude that the adjacent wetlands fall within the Act.[10]

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[10] The Court in *SWANCC* noted that the Corps' *original* regulations published in 1974 defined "navigable waters" narrowly, consistent with prior federal statutes. 531 U.S. at 168. However, there is evidence that the Corps may have intentionally construed Congress's intent in the Clean Water Act too narrowly. *See* Lance D. Wood, *Don't Be Misled: Clean Water Act Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ELR 10187, 10211-10212 (Feb. 2004) (attaching letter from counsel who represented the Corps in 1974, stating that at that time the Corps' decision makers and senior attorneys knew that Congress had intended jurisdiction under the Act to extend much further than the prior statutory definition of "navigable waters," but that they nevertheless reasserted the previous narrower scope for political reasons and with an understanding that the interpretation in all probability would be reversed in the courts as contrary to the intent of Congress, as in fact occurred in *Callaway*).

D. Petitioners' Proposed Interpretation Has No Support In The Statute And Could Nullify Congress's Comprehensive Design

The *Rapanos* petitioners and some *amici* argue that jurisdiction under Section 404 of the Act reaches no further than wetlands directly abutting traditional navigable waters. *See, e.g.*, Rapanos Br. 11. Petitioners point to nothing in the statute or its legislative history to support this argument. Indeed, one former Corps official has estimated that if the definition of "waters of the United States" were interpreted to embrace only traditional navigable waters and their abutting wetlands, the result would be to exclude from Clean Water Act coverage—and thus federal protection—more than 99% of the waters now understood to be covered by the Act. *See* Wood, *supra* n.10, at 10192-10193. Consequently, such a construction makes no sense, as it would fundamentally defeat the Act's core purpose of ensuring that federal jurisdiction is sufficient to successfully combat water pollution.

Moreover, the effect of this massive curtailment of federal jurisdiction would not be limited to the filling of wetlands. The restrictive definition advanced by petitioners also would gut the "point source" pollution-discharge prohibition under Section 402 of the Act and other important programs relating to water quality because the statutory terms material to this case are similarly critical throughout the Act. *See* 33 U.S.C. § 1342; *see also* 43 Op. Att'y Gen. 197, at 200-201 (Sept. 5, 1979) ("The term 'navigable waters' . . . is a linchpin of the Act. . . . Its definition is not specific to § 404, but is included among the Act's general provisions."). Thus, petitioners' proposed interpretation would immunize from federal regulation disposal of oil, chemicals, and other pollutants into the vast majority of our Nation's wetlands and waterways.

The *Carabell* petitioners advance an alternative interpretation conveniently suited to the particular facts of their case. They suggest that Congress intended to limit jurisdiction under the Act to wetlands that flow continuously into

waters that are navigable-in-fact. *See* Carabell Br. 19. But the Act simply does not include any such restrictions.

Petitioners' statutory arguments cannot be understood as a serious effort to discern the intent of Congress. Rather, they are a transparent attempt to have this Court reverse three decades of settled legislative policy. The Court should take this opportunity to make clear that the holding of *Riverside Bayview* controls when it comes to the Corps' jurisdiction over wetlands functionally connected to navigable-in-fact waters. The changes to the scope of the Clean Water Act advocated by petitioners must be sought from Congress, not the courts.

Finally, this Court should reject petitioners' argument that the Court must construe the scope of federal jurisdiction narrowly under the canon of constitutional avoidance. *See* Carabell Br. 31; Rapanos Br. 22. This doctrine arises "only when there are serious concerns about the statute's constitutionality." *Harris* v. *United States*, 536 U.S. 545, 555 (2002). As demonstrated in Part II below, the Corps' interpretation of the Clean Water Act to cover "adjacent wetlands" does not even come close to "invok[ing] the outer limits of Congress' power." *Cf. SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Nor, as discussed in Part III below, does this interpretation "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* (citing *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

II. Congress Has Authority To Protect Wetlands Adjacent To Tributaries Of Traditional Navigable Waters

This Court has identified three general categories of regulation in which Congress may engage pursuant to its plenary power over interstate commerce: (1) regulation of the "channels of interstate commerce"; (2) regulation of "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and (3) regulation of "activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2205 (2005). Federal jurisdic-

tion over the "adjacent wetlands" in these cases fits comfortably within both the first and third categories.

A. Jurisdiction Over Wetlands Adjacent To Tributaries Of Traditional Navigable Waters Protects Channels Of Commerce

1. Adjacent Wetlands Provide Flood Control Functions Necessary To Navigability

It is well settled that "[t]he power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States." *Gilman* v. *City of Phila.*, 70 U.S. (3 Wall.) 713, 724-725 (1866) (citing *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Congress has the power to "take *all needed measures* to preserve the navigability of the navigable water course of the country." *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899) (emphasis added). This power is not limited to the navigable portion of a waterway, but applies to any substantial threat to the navigable capacity "wherever done or however done." *Id.* at 708. "[C]ontrol over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions . . . ." *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941). "Flood protection" along with "watershed development" are "parts of commerce control," and thus "the power of flood control extends to the tributaries of navigable streams." *Id.* (quoting *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940)).

Congress's authority to regulate filling of wetlands is supported by its "channels" power because wetlands play an important role in flood control that affects navigability downstream. A single acre of wetlands can store more than one million gallons of water.[11] That absorptive ability allows wetlands adjacent to tributaries of traditional navigable waters to intercept storm run-off and slowly release or evapo-

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[11] United States Environmental Protection Agency, *Functions and Values of Wetlands*, EPA 843-F-01-002c (Sept. 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf.

rate water after peak flow has subsided, thereby regulating water levels and reducing downstream flood damage.[12] Freshwater wetlands, including forested wetlands, located along the upper parts of river systems are thought to play a particularly important role in flood prevention.[13]

Because non-navigable tributaries may comprise more than three-quarters of the total waterway length in a river network,[14] the functional contribution of wetlands adjacent to these tributaries is critically important to flood control. Moreover, since floodwaters can travel over or under berms and minor obstructions, wetlands directly adjacent to tributaries serve as effective storm-water buffers even when those wetlands do not have surface water connections with the water bodies that they are protecting.

Further, this Court has held that the extent to which a particular wetland will alleviate flood conditions does not bear on the constitutional analysis. *Atkinson*, 313 U.S. at 527. "[T]he decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods" is left to Congress, not the courts. *Id.* at 528.

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[12] *See* William J. Mitsch & James G. Gosselink, *Wetlands* 584 (2d ed. 2000) ("Because it is usually the peak flows that produce flood damage, the effect of the wetland area is to reduce the danger of flooding.").

[13] Paul F. Scodari, *Wetlands Protection: The Role of Economics* 21 (1990); Theda Braddock, *Wetlands: An Introduction to Ecology, the Law, and Permitting* (1995) ("[T]he presence of vegetation and forests in particular can enhance this function through the creation of great roughness or friction which can slow floodwater velocities.").

[14] *See* Judith L. Meyer et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7 (2003), *available at* http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf.

2. Adjacent Wetlands Protect Traditional Navigable Waters From Pollution And Injurious Uses

Jurisdiction over adjacent wetlands also is necessary to protect our Nation's waters from pollution. In *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), the Sixth Circuit noted that "water pollution is . . . a direct threat to navigation." *Id.* at 1325 (citing *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 427 (1958)). Applying *Atkinson*, the court in *Ashland Oil* held that as "the power of flood control extends to the tributaries of navigable streams . . . the power of pollution control extends to the tributaries of navigable streams likewise." *Id.* at 1327 (internal quotation marks omitted).

This Court has cited with approval the holding in *Ashland Oil*. Addressing the constitutionality of the Surface Mining Act, which established national standards addressing environmental degradation caused by mining operations, the Court in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n* "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." 452 U.S. 264, 282 (1981) (citing *e.g.*, *Ashland Oil*).

Based on this authority, all courts of appeal that have considered the matter have held that the Clean Water Act's prohibition of the discharge of pollutants and fill material into navigable-in-fact waters, their tributaries, and adjacent wetlands is authorized under Congress's "channels" power even if there is no effect on navigability. In *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), which involved facts similar to those in *Rapanos*, a unanimous Fourth Circuit panel concluded that "Congress's authority over the channels of commerce is . . . broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes." *Id.* at 707 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)).

In *United States* v. *Gerke Excavating, Inc.*, a unanimous Seventh Circuit panel agreed. Judge Posner observed that

"Congress may forbid the pollution of navigable waters even if the pollution has no effect on navigability." 412 F.3d 804, 807 (7th Cir. 2005). He continued, "it doesn't matter whether the objection to allowing the Gerkes of this world to dry out wetlands is that the effect may be to reduce water levels in navigable waterways to the point at which navigation would be affected or that the effect may be to increase the level of pollution in such waters by reducing the supply of unpolluted wetlands water." *Id.*

Because any pollutant or fill material discharged into a tributary of a navigable-in-fact waterway "has the potential to move downstream and degrade the quality of the navigable waters themselves," *Deaton*, 332 F.3d at 707, Congress's authority is broad enough to allow it to legislate—as it did in the Clean Water Act—to protect against pollution of navigable-in-fact waters by regulating functionally connected wetlands.[15] Regardless of whether pollution takes place in navigable-in-fact waters, or flows directly there from neighboring wetlands (*Riverside Bayview*), or flows there through tributaries of navigable-in-fact waters (*Rapanos*), water is water, and there is no *constitutional* distinction based on the nature or location of the discharge. Nor does the presence of a berm that arguably interrupts the downstream flow of water from adjacent wetlands (*Carabell*) affect Congress's power to protect traditional navigable waters by preserving the connected wetlands' essential role in ensuring flood control, maintaining proper nutrient levels, filtering sediments and pollutants, and providing habitat. Even where there is little or no downstream flow, adjacent

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[15] At a recent congressional hearing before the Subcommittee on Water Resources and Environment, Rep. Gilchrest described a dye experiment conducted by the Corps on the property at issue in *Deaton*: The Corps dropped a little dye in the drainage ditch adjacent to the property and learned that when it became soluble, it traveled all the way to the Wicomico River—a tidal basin of the Chesapeake Bay. *Inconsistent Regulation of Wetlands and Other Waters: Hearing Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 108th Cong., at 4 (2004).

wetlands still perform essential downstream functions that are threatened if the wetlands are lost to condominiums and shopping malls.

The Clean Water Act's "adjacent wetlands" jurisdictional framework survives constitutional scrutiny even if it may reach some instances where there is no demonstrated threat to the integrity of traditional navigable waters. Congress may, for example, prohibit the discharge of deleterious substances into wetlands adjacent to tributaries of navigable-in-fact waters without subjecting its regime to judicial review of the likelihood that each wetland has a significant effect on navigable waters. This is so for two reasons. First, small instances add up: "Congress . . . may decide that the aggregate effect of all the individual instances of discharge . . . justifies regulating each of them." *Deaton*, 332 F.3d at 707 (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). Second, Congress may draw rational lines to prevent harm, without requiring that every case be tested to see whether there is an instance of the harm threatened: "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class," *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (citations omitted). Thus, federal jurisdiction is not dependent on showing a particular threat in a particular case to particular navigable waters. Congress has the power to implement rational jurisdictional rules necessary to protect navigable waters, and the Corps may then constitutionally assert such jurisdiction without a showing of a specific threat in each individual case.

This Court in *Riverside Bayview* recognized as much when it noted that not every wetland that falls within the Corps' jurisdiction necessarily is an asset to navigable waters. If a given wetland is "in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." 474 U.S. at 135 n.9. Though the scope of the threat to navigable-in-fact waters may be relevant to the Corps' permit decision, it does not bear on the determination of fed-

eral wetlands jurisdiction or on the constitutionality of Congress's regulatory regime to protect and preserve navigable channels of commerce.

B. Pollution And Destruction Of Wetlands Adjacent To Tributaries Of Traditional Navigable Waters Have Substantial Effects On Interstate Commerce

Federal jurisdiction over adjacent wetlands also falls within Congress's ability to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *See Raich*, 125 S. Ct. at 2205. Federal power over local activities may be necessary and proper to Congress's regulation of interstate commerce. *Id.* at 2216 (Scalia, J., concurring).

"Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.'" *Hodel*, 452 U.S. at 276 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196) (citations omitted). The key inquiry is whether there is a rational basis for Congress's determination that the class of activities substantially affects interstate commerce and whether the means that Congress employed are reasonably tailored to the objectives of the statute. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). The Court will uphold a reasonably well-tailored regulation of economic activity under the Commerce Clause unless it "is clear that there is no rational basis" for a determination that the regulated activity substantially affects interstate commerce. *FERC* v. *Mississippi*, 456 U.S. 742, 753-754 (1982).

1. The Clean Water Act Regulates Economic Activity Like The Activities Here

The activities regulated under the Clean Water Act are obviously and overwhelmingly economic in nature. Discharges of pollutants into surface waters occur primarily as a result of industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. *See, e.g.*, 40

C.F.R. pts. 403-610 (listing CWA effluent guidelines for 73 categories of industrial activities, which fill over 1500 pages of the Code of Federal Regulations). Similarly, dredging and filling of wetlands regulated under Section 404 are costly activities that are undertaken by commercial interests for monetary gain. *See* Thomas E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997*, at 12 (2000).

The facts here demonstrate the inherently economic nature of the activities regulated under the Act. Through their development corporation, the *Carabell* petitioners sought to drain a wetland in order to build their proposed 112-unit multi-building condominium complex. The *Rapanos* petitioners and their various corporations had to level the ground and dump sand into numerous wetlands in order to build their roads and shopping center. The wetlands at issue in both cases were owned by corporate entities seeking profit for their shareholders, not by individuals with non-economic intentions. The proposed destruction of wetlands in these cases represented substantial and integral steps in petitioners' construction projects and, as such, constituted economic activities for Commerce Clause purposes.

2. Pollution And Destruction Of Adjacent Wetlands Have Substantial Effects On Interstate Commerce

In *Hodel*, the Court upheld Congress's Commerce Clause authority to regulate local surface mining activities because of the cumulative effects on interstate commerce of "destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources." 452 U.S. at 277. As was true of the intrastate

surface mining activities in *Hodel*, the discharge of pollutants or other fill material into wetlands adjacent to tributaries of traditional navigable waters impairs or eliminates a number of valuable ecological functions, leading to the same environmental harms and associated burdens on interstate commerce. These wetland functions include:

(a) *Flood Control.* The flood-control function of wetlands has significant impacts on the economy.[16] In a 1978 study, the Corps estimated that wetlands provided 75% of the natural water storage in the Charles River watershed and that loss of the flood-control function of these wetlands would lead to $18 million in flood damage per year.[17] The loss of flood-control services can have tremendous economic consequences. Floods killed 835 people and caused approximately $41.5 billion worth of damage between 1994 and 2003.[18] The 1993 Midwest flood, which was exacerbated by the loss of wetlands in the Mississippi River watershed, killed 70 people and destroyed approximately $18 billion in homes, businesses, and crops.[19]

(b) *Pollutant and Nutrient Removal.* Wetlands remove pollutants—including toxic chemicals, sediments, and harmful levels of nutrients like nitrogen and phosphorus—from waters of the United States. *See* United States Dep't

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[16] According to the Corps' evaluation of the Carabell proposal: "Wetlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area." United States Army Corps of Engineers, Department of the Army Permit Evaluation, File No. 99-250-002-1, at 6-7 (C.A.J.A. 107-108).

[17] Francis R. Thibodeau & Bart D. Ostro, *An Economic Analysis of Wetlands Protection*, J. Envtl. Mgmt. 19, 22 (1981); *see also* 123 Cong. Rec. 38994 (1977) (Statement of Rep. Lehman) (noting that wetlands provide $140 billion worth of flood control and water purification services).

[18] United States Army Corps of Engineers, *Annual Flood Damage Report to Congress for Fiscal Year 2003*, tables 4 & 5 (June 2003), *available at* http://www.usace.army.mil/inet/functions/cw/cecwe/flood2003/.

[19] Brett Hulsey & Geoff Tichenor, *A Call for Flood Security Through Wetland Protection*, National Wetlands Newsletter 3-4 (May-June 2000).

of Agric., Econ. Res. Serv., *"Dead Zone" in the Gulf: Addressing Agriculture's Contribution*, Amber Waves 8 (Nov. 2003) (USDA, Amber Waves). Pollutant removal generally occurs in two stages: filtration and withdrawal. Office of Technology Assessment, *Wetlands: Their Use and Regulation* 48 (1984) (OTA). Filtration occurs as pollutants precipitate out of the slow-moving waters in the wetlands. Withdrawal occurs either when those pollutants are bound up in the wetlands' biomass (*i.e.*, plant matter) and substrate or when complex biochemical processes in the wetlands convert the chemical compounds into ecologically inert forms. *See* Scodari, *supra* n.13, at 14. While all wetlands serve as nutrient and sediment traps to some degree, those with fine, anoxic sediments, such as the forested wetlands in these cases, are particularly well suited to storing and removing nutrients. *Id.* In the absence of wetlands, increased levels of agricultural run-off and other pollutant-saturated wastewater make their way directly into tributaries and then into other economically valuable waters of the United States.

The effects of nutrient pollution can be devastating. A number of significant commercial fishing grounds, including the Gulf of Mexico and the Chesapeake Bay, currently suffer from a condition of depleted oxygen content known as "hypoxia" due to elevated levels of nitrogen, phosphorus, and other nutrients in the rivers that flow into these water bodies. The hypoxic zone in the Gulf of Mexico doubled in size, to 18,000 square kilometers, after the 1993 Midwest Floods.[20] Hypoxia reduces biological productivity and leads to fish kills, creating expansive areas of water known as "dead zones" that are essentially devoid of life. *See* USDA, Amber Waves 8. The loss of productivity in the Chesapeake Bay, Gulf of Mexico and other key fishing grounds that are currently suffering from nutrient pollution would have significant impacts on the national economy. According to the De-

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[20] National Centers for Coastal Ocean Science, *Hypoxia in the Gulf of Mexico*, *at* http://oceanservice.noaa.gov/products/pubs_hypox.html (last visited Jan. 11, 2006).

partment of Commerce, Americans spent over $61.9 billion on seafood products in 2004. National Marine Fisheries Service, *Fisheries of the United States: 2004* (2005); *see also* National Academy of Sciences, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* 111 (2000) (reporting the results of a study that found that restoring 100,000 acres of wetlands in the Mississippi River basin would provide an economic benefit of between $11.8 and $40 billion based on increases in water quality).[21]

Finally, wetlands adjacent to tributaries play a key role in filtering out sediments that would otherwise harm traditional navigable waters. These wetlands may remove up to 80% of suspended sediments from the water that flows through them.[22] Sedimentation is a major threat to commercially-important fish species such as salmon, which spawn in freshwater streams and need clean water to ensure that their eggs receive enough oxygen to survive.

(c) *Fisheries and Other Wildlife Habitat Support.* Adjacent wetlands also serve habitat needs of economically significant wildlife species. Wetlands are more effective producers and exporters of useful nutrients than terrestrial systems. Scodari, *supra* n.13, at 15. Forested wetlands such as those at issue here can produce 7-14 metric tons of biomass per hectare each year. OTA, *supra* p. 23, at 59. As this material decomposes, it supports the growth of the invertebrate populations that form the basis of the aquatic food chain. *Id.* at 58. Thus, elimination of this source of natural material, either through development of the wetland or the

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[21] These commercial impacts extend beyond fisheries. One study recently estimated that the boating, recreational fishing, and swimming benefits resulting from the decrease in nutrient loading as a consequence of Clean Water Act regulation were between $357.9 million and $1.8 billion. Cynthia Morgan & Nicole Owens, *Benefits of Water Quality Policies: The Chesapeake Bay*, 39 Ecological Econ. 271, 274 (2001).

[22] John F. Elder & Gerald L. Goddard, *Sediment and Nutrient Trapping Efficiency of a Constructed Wetland Near Delavan Lake, Wisconsin, 1993-1995*, *available at* http://wi.water.usgs.gov/pubs/FS-232-96/FS_232-96.pdf.

severing of the surface water connection between the wetland and surrounding waters, deprives the wildlife population of an important food source. Moreover, numerous species of commercial and sport fish, including pike and largemouth bass, rely on temporarily flooded freshwater wetlands for spawning grounds. *Id.* at 56. In addition to the $61.9 billion in commercial seafood consumption noted above, Americans spent $35.6 billion on recreational fishing in 2001. U.S. Fish & Wildlife Service, *2001 National Survey of Fishing, Hunting & Wildlife-Associated Recreation* 4 (2002). More generally, approximately 82 million U.S. residents participated in wildlife-related activities in 2001, with expenditures related to such activities totaling $108 billion. *Id.*

While the loss of functions associated with any particular wetland alone might not significantly affect commerce, it is sufficient that Congress had a rational basis for concluding that the aggregate commercial impacts stemming from impairment of these wetland functions, including flood control, pollutant filtration, and habitat support, would have such an impact. *See Raich*, 125 S. Ct. at 2207-2209; *Wickard*, 317 U.S. at 127-128; *see also Perez*, 402 U.S. at 154. Given the key role that wetlands play in ensuring the health and integrity of the waters of the United States and the importance of these waters to the national economy, Congress plainly could have rationally concluded that the loss of wetlands currently subject to federal jurisdiction would have a substantial effect indeed on interstate commerce.

3. Protection Of Adjacent Wetlands Is Necessary To The Clean Water Act's Regulatory Scheme

Federal authority under the Commerce Clause to regulate intrastate activity also is appropriate where it is an essential part of a larger regulatory scheme. *Raich*, 125 S. Ct. at 2207. A comprehensive regulatory program such as the Clean Water Act can be upheld without a specific showing that every facet of the program is independently and directly related to a valid congressional goal if the scheme as a whole is valid and the challenged provision is an integral part of that scheme. *See Hodel* v. *Indiana*, 452 U.S. 314, 329

n.17 (1981). This Court recently upheld a federal ban on intrastate possession of marijuana to avoid creating a "gaping hole" in the comprehensive federal drug control scheme. *Raich*, 125 U.S. at 2209. Because pollutants can harm the integrity of a water network regardless of whether they enter that network through a large interstate river or a small intrastate tributary, this Court should uphold the Corps' regulation of wetlands adjacent to tributaries of traditional navigable waters to avoid creating a similar hole in Congress's comprehensive scheme to combat water pollution.

III. Jurisdiction To Protect Adjacent Wetlands Is Necessary To The Federal-State Framework Created By Congress And Consistent With Principles Of Federalism

Petitioners and their *amici* argue that affirming federal jurisdiction in these cases would violate principles of federalism and undermine the role of the States in protecting water resources. They advance various proposed "tests" for jurisdiction, supposedly in defense of the prerogatives of the States, by which they are effectively asking this Court to divide jurisdiction over wetlands protection between the federal government and the States. But the division of jurisdiction proposed by petitioners' *amici* would directly conflict with Congress's stated intention to create a comprehensive federal program of water protection. *See International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987).

A. Congress Provided For State Regulation

In the context of this comprehensive federal program, Congress chose "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *SWANCC*, 531 U.S. at 166-167 (quoting 33 U.S.C. § 1251(b)). All States, including those that lack independent wetlands laws, have authority under Section 401 of the Act to participate in the federal wetlands permitting process to ensure

that permit decisions are consistent with each State's water quality standards. 33 U.S.C. § 1341.

In addition, Section 404(g) of the Act authorizes a State to apply to the EPA for permission "to administer its own individual and general permit program for the discharge of dredged or fill material" into certain navigable waters. By incorporating Section 404(g) into the Act, Congress "opted . . . for a scheme that encouraged States to supplant federal control with their own regulatory programs." 513 U.S. at 192 (Stevens, J., dissenting).[23] But to attain the national goal of restoring the integrity of navigable waters, Congress determined that where States assumed the lead, States would implement and enforce standards no less stringent than the federal rules. This cooperative federal-state framework mandated by Congress necessarily depends on federal jurisdiction over all waters of the United States. Absent such jurisdiction, the statutory provision permitting States to assume primacy would be rendered meaningless with respect to vast tracts of critically important wetlands, and Congress's goal of consistent national protection would be defeated.

Thus, petitioners' reliance on the Act's preamble (33 U.S.C. § 1251(b)), to argue that the States are "primary," is wholly misplaced. The Act was not intended to *limit* the overarching comprehensive nature of the federal program, but rather to ensure that States could play a primary role *within* that program if they so elected. *See* S. Rep. No. 92-414 (explaining that "[a] significant aspect of the entire bill is the emphasis placed on development of a cooperative state-federal approach toward environmental enhancement" while noting that the federal government retains ultimate control for setting certain water pollution control standards); *New*

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[23] This integrated system of environmental regulations has state and federal components. *See, e.g.*, 33 U.S.C. § 1251(g) ("Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.").

York v. *United States*, 505 U.S. 144, 167 (1992) (describing legal framework of "cooperative federalism").

B. Wetlands Protection Does Not Impair Traditional State Functions

Petitioners repeatedly describe federal wetlands protection as "land use regulation" and argue that it usurps traditional state powers in this area. *E.g.*, Rapanos Br. 29; Carabell Br. 45. But that label has no basis in fact. Destruction of wetlands and the related threats to downstream waters have never been principal subjects of land use law. *See California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987); *see also Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (observing that traditional State authority to regulate natural resources must be shared when the federal government exercises one of its enumerated powers). Indeed, prior to 1970, most states did not regulate wetlands impacts, *see* Jon A. Kusler et al., *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers 1994), and the losses, as noted above, were massive.

Moreover, incidental impacts on local authority do not defeat federal jurisdiction. "This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that preempt particular exercises of state police power." *Hodel*, 452 U.S. at 292 (citations omitted) (rejecting contention that mining regulations impermissibly interfered with traditional state land use powers). To argue that federal wetlands protections should be invalidated because they intrude on States' traditional regulation of land use is similar to arguing that federal civil rights legislation should be invalidated because States traditionally regulated employment and business operations. The fact that a federal program, addressing quintessentially national problems, may indirectly affect traditional state functions is not a proper reason to disable the federal government from acting.

C. Federal Authority Is Necessary To Address This National Problem

A core objective of the Framers in 1787 was to empower the federal government to address problems national in scope that the individual States were incapable of solving themselves. The sixth Virginia Resolution, approved by the Constitutional Convention on July 17, 1787, highlighted this principle that "the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Notes of Debates in the Federal Convention of 1787, 380 (W.W. Norton & Co. ed., 1966). This fundamental principle—that the federal government must be able to legislate to solve national problems, particularly where the States are unable to do so themselves—is just as important to the principles of federalism as the reservation to States of their traditional police powers.

Clean water and healthy wetlands benefit the entire Nation, and only a federal program with uniform standards can maintain these wetlands and protect adjacent waters. *See generally* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1252-1253 (1995). The inherent economic incentives favoring development in a purely state-by-state framework further highlight the importance of retaining federal jurisdiction over adjacent wetlands. The benefits from development flow to individual States, while many of the costs of wetlands loss are widely dispersed. *See SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting); *see also Gerke*, 412 F.3d at 807 (rejecting federalism argument as "two-edged" for "[t]he more extensive the wetlands, the greater their potential importance as a source of water to keep the navigable waterways full and clean"). Thus, the local costs and benefits of development should be weighed against national costs and benefits; in the absence of this

kind of national calculus, the interests of downstream States are unlikely to be adequately considered.

Congress has traditionally enjoyed the Commerce Clause power to prevent the "destructive interstate competition" that arises where different States offer uneven levels of environmental protection. *See Hodel*, 452 U.S. at 282 (upholding congressional finding that nationwide surface mining and reclamation standards are essential to ensure that interstate competition does not undermine the ability of individual States to maintain adequate standards within their borders). In the context of wetlands regulation, "[i]f [development] pressures are to be tempered in favor of wetlands preservation, there are g od reasons for this regulation to be federal, reasons that drove enactment of the Clean Water Act and section 404 in the first place.... [U]neven regulation among the states tended to penalize those that safeguarded the national interest and to favor a 'race to the bottom' towards maximum development." Houck & Rolland, *supra* p. 29, at 1310.

Finally, the federal-state partnership that resulted in the implementation of the Clean Water Act has been highly effective in achieving the objectives set by Congress. Over more than three decades, the law has delivered dramatic reductions in pollution and stronger protection of wetlands resources of great value to the American people. Congress's achievement in fashioning this framework, and the performance of both the federal and state governments in making the Act work, have been a signal success. The vital federal role in the preservation of water resources intended by Congress in the Clean Water Act should be upheld by the Court.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

LESLIE CAROTHERS
JAY E. AUSTIN
D. BRUCE MYERS JR.
LISA GOLDMAN
ENVIRONMENTAL LAW INSTITUTE
2000 L Street, N.W.
Washington, DC 20036
(202) 939-3800

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
JAMES R. WRATHALL
CAREY BOLLINGER
RACHEL Z. STUTZ
TODD HETTENBACH
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

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Nos. 04-1034 and 04-1384

In The
Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF FORMER EPA ADMINISTRATORS CAROL M. BROWNER, WILLIAM K. REILLY, DOUGLAS M. COSTLE, and RUSSELL E. TRAIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM W. BUZBEE
Gambrell Hall
1301 Clifton Road
Atlanta, Georgia 30322
Telephone: (404) 727-6507
Facsimile: (404) 727-6820

DEBORAH A. SIVAS
LAWRENCE C. MARSHALL
Counsel of Record
HOLLY D. GORDON
STANFORD LAW SCHOOL
ENVIRONMENTAL LAW CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305
Telephone: (650) 724-1900
Facsimile: (650) 723-4426

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae[2] are a bipartisan group of former Environmental Protection Agency ("EPA") Administrators, spanning nearly twenty years of service, with an interest in the continued application of the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.* (hereinafter "Clean Water Act") to all waters of the United States, including tributaries and adjacent wetlands like those involved here. These cases are about much more than two isolated disputes over the U.S. Army Corps of Engineers' ("Corps") wetlands jurisdiction. Petitioners' arguments to exclude non-navigable waters and their adjacent wetlands from federal regulation strike at the very heart of the nation's water pollution control programs. As the agency primarily charged with implementing the Clean Water Act, EPA has worked closely with the states over the last three decades to make steady progress toward reducing waterborne contamination and restoring the commercial, recreational, and ecological health of our aquatic systems. *Amici* have an abiding interest in ensuring that this successful federal state partnership and the long-settled administrative practices on which it is built are not weakened by an unnecessarily narrow interpretation of the statute.

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[1] All parties have consented to the filing of this brief in letters that are on file with the Clerk. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* are Former EPA Administrator Carol M. Browner (Jan. 1993 to Jan. 2001), Former EPA Administrator William K. Reilly (Feb. 1989 to Jan. 1993), Former EPA Administrator Douglas M. Costle (Mar. 1977 to Jan. 1981), and Former EPA Administrator Russell E. Train (Sept. 1973 to Jan. 1977).

SUMMARY OF ARGUMENT

The key phrase at issue here – "waters of the United States" – undergirds every water pollution control program established in the Clean Water Act, not just the wetlands permit program. Most significant among these water quality efforts are the law's basic prohibition against discharging pollutants into waters without a permit, 33 U.S.C. § 1311(a), the National Pollutant Discharge Elimination System ("NPDES") permit program established by section 402 of the Act, 33 U.S.C. § 1342, and the statute's linked water quality-based requirements. In broadly defining "navigable waters" as "waters of the United States," Congress recognized both the reality of hydrologic cycles and the need to address pollution at its source. Given the quintessentially economic activities regulated by the statute, and by the Corps in these particular cases, Congress unquestionably acted within its Commerce Clause powers in articulating a statutory definition broad enough to effectuate the statute's various pollution control programs.

In the three decades since the Clean Water Act's passage, regulatory agencies and the courts have given effect to Congress' intent by consistently interpreting the term "navigable waters" to cover all interconnected waters, including non-navigable tributaries and their adjacent wetlands. The system of cooperative federalism that Congress envisioned in crafting the Clean Water Act has since developed into a robust federal-state partnership that relies heavily on this interpretation of the statute's jurisdiction. The radical reinterpretation that Petitioners press here would upend long-settled expectations, hamstring enforcement efforts, and impair the ecological,

recreational, and commercial value of the nation's lakes, rivers, and coastal estuaries.

Petitioners base their arguments primarily on an expansive misreading of a few clauses in *Solid Waste Agency of Northern Cook County ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), while failing to heed the more directly applicable holdings and language of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The touchstone for the Court's analysis in both cases was the scope of the term "navigable waters," expressly defined by the Clean Water Act as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In *Riverside Bayview*, the Court recognized that the Clean Water Act confers broad regulatory jurisdiction on the Corps and EPA over "wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U.S. at 131. The Court's decision in *SWANCC* confirmed the ongoing validity of *Riverside Bayview*, concluding only that Clean Water Act jurisdiction does not extend as far as non-navigable "isolated ponds, some only seasonal, wholly located within two Illinois counties" solely because they serve as habitat for migratory birds. 531 U.S. at 171-72.

The Corps' actions in both *Rapanos* and *Carabell* fall squarely within the contours of *Riverside Bayview*. Petitioners' arguments amount to nothing more than a request by two commercial real estate developers that the Court second-guess the ecological judgments of the expert administrative agencies concerning water flows, the significance of wetlands and their connection to tributaries, and the role of these components of the aquatic system in protecting water quality. *Riverside Bayview* soundly

rejected Petitioners' proffered approach, deferring to the agencies' general regulatory judgments and site-specific ecological assessments. There is no reason for the Court to revisit this settled issue.

ARGUMENT

I. A BROAD INTERPRETATION OF THE TERM "WATERS OF THE UNITED STATES" IS PIVOTAL TO THE NATION'S WATER POLLUTION CONTROL EFFORTS.

Although focused on jurisdictional wetlands, these cases have vastly broader and more troubling implications. Petitioners essentially ask the Court to rewrite and restrict the definition of "waters of the United States," a phrase that governs not only the jurisdictional scope of section 404 "dredge and fill" permits like the ones at issue here, but also every other pollution protection program established by the Act. A decision by the Court to cast aside more than three decades of settled administrative and judicial interpretations of the phrase "waters of the United States" would strike a crippling blow at the underpinnings of the Clean Water Act.

A. The Clean Water Act of 1972 Constituted a Radical Departure from Prior Federal Water Quality Laws and Enacted a Comprehensive Pollution Control Regime.

Adopted in the wake of burning rivers and toxic fish, the Clean Water Act discarded the ineffective approaches of the past and set a bold new course for cleanup of the nation's polluted waterways. The overarching objective of

the Clean Water Act is no less than "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress declared the ambitious goals of attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by 1983 and eliminating altogether the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1)-(2). In addition to its aspirations of achieving "fishable" and "swimmable" waters, the statute also announced a new national policy of prohibiting "the discharge of toxic pollutants in toxic amounts." 33 U.S.C. § 1251(a)(3). Thus, as this Court has recognized, the contemporary Clean Water Act is a comprehensive pollution control law aimed at controlling commercial activities that previously evaded regulation under federal, state and local laws. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310, 317-18 (1981) (finding that the 1972 amendments constituted "a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation"). *See also Environmental Protection Agency v. California*, 426 U.S. 200, 202 (1976) (discussing the ineffectiveness of pre-1972 state and federal water pollution control efforts); *Train v. City of New York*, 420 U.S. 35, 37 (1975) (stating that 1972 amendments "provide a comprehensive program for controlling and abating water pollution").[3]

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[3] The statute also directs the EPA Administrator, in cooperation with the states and others, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground water." 33 U.S.C. § 1252(a). These comprehensive programs must "conserve such waters for the protection

(Continued on following page)

To achieve these ends, Congress built the Clean Water Act's key provisions around the then-novel concept that, except as specifically allowed, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The pivotal term "discharge of pollutant" is statutorily defined as "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12)(A). The term "navigable waters" is, in turn, defined by statute as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Thus, the scope of EPA's and the Corps' jurisdiction to regulate the discharge of any pollutant under the Clean Water Act is coextensive with the reach of the phrase "waters of the United States."

As this Court has recognized, "Congress evidently intended [in 1972] to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133 (citing S. Conf. Rep. No. 92-1236, at 144 (1972) and 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)). These earlier statutes – particularly the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, and the Federal Water Pollution Control Act of 1948, as amended – were focused on waters that are or have been used, or may be susceptible for use,

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and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." *Id.* Additionally, the statute funds basinwide water quality planning, to be done on a watershed basis taking into consideration "rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof as well as the lands drained thereby." *Id.* § 1252(c).

to transport interstate commerce and were generally considered inadequate to regulate industrial pollutants.[4] Growing public concern over water quality and the inability of existing laws to effectively control pollutants at their source led directly to enactment of the new Clean Water Act in 1972, with its focus on the all-encompassing section 402 discharge permit program. *See* Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 849 (1989).

B. Petitioners' Interpretation Would Eviscerate the Section 402 NPDES Permit Program, which Lies at the Heart of the Clean Water Act.

The NPDES program under section 402 is the cornerstone of the Clean Water Act's pollution control efforts, entirely replacing the Corps' nascent permit program

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[4] In the 1960's, the Corps began regulating industrial pollutants under section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which prohibits the discharge of refuse (but not sewage) into navigable water and "any tributary of any navigable water from which the same shall float or be washed into such water." *See United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966) (release of aviation fuel into river). However, the agency's attempt to develop a formal discharge permit program extending to both navigable waters and their tributaries was dealt a blow in *Kalur v. Resor*, 335 F. Supp. 1, 9 (D.D.C. 1971) (finding permit regulations adopted in 1971 to be *ultra vires*). *See also generally* Donna M. Downing, Cathy Winer, and Lance D. Wood, *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 Wetlands 475, 476-78 (Sept. 2003) (describing history of Rivers and Harbors Act and judicial interpretations of traditional navigability test); Maria V. Maurrase, *Oklahoma v. EPA: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?*, 45 U. Miami L. Rev. 1137, 1146-49 (1991) (describing inadequacies of pre-1972 Federal Water Pollution Control Act).

under the Rivers and Harbor Act. *See* 33 U.S.C. § 1342(a)(5).[5] It constitutes a comprehensive permit system for "the discharge of any pollutant" into waters of the United States, requiring that all such discharges comply with technology-based effluent limitations established by EPA for various industrial categories of "point sources." *Id.* § 1342(a)(1). NPDES permittees also must comply with backstop water-quality based effluent limitations, if and as necessary to protect public health, industrial and recreational uses, and ecological functions. *Id.* § 1312(a). The section 402 program broadly applies both to conventional pollutants, such as those commonly associated with sewage treatment activities and industrial operations, and to those dangerous chemical pollutants deemed "toxic" by the EPA Administrator. *Id.* § 1317(a)(1).

Petitioners' reading of the phrase "waters of the United States" to exclude non-navigable tributary waters and their adjacent wetlands based on geographic proximity (or, as the *Carabell* Petitioners apparently contend, failure to prove a robust hydrologic connection to directly adjacent waters) threatens to unravel the protections of the NPDES permit program. A watershed is a vast braided

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[5] The Clean Water Act dramatically changed the prior legal landscape by conferring on the newly-created EPA the responsibility for implementing the section 402 permit program and all other facets of the statute, save for the section 404 permit program. *See* 33 U.S.C. § 1251(d). Consistent with the Corps' historic role over dredge and fill activities in navigable waters, the Act conferred section 404 permitting authority on the Corps, but gave EPA ultimate veto authority over such permits. *Id.* § 1344(a)-(c). *See* 43 U.S. Op. Atty. Gen. 197, 201-02, 1979 WL 16529 (Sept. 5, 1979) (noting that the term "navigable waters" is the linchpin for all Clean Water Act programs and concluding that EPA, not the Corps, has the ultimate authority for a uniform definition of the term).

network of streams, wetlands, and pools, intertwining to form the great rivers, lakes, and estuaries downstream. Upstream tributary streams – which form at least 75 percent of the nation's stream miles – act as a complex living filter system and are biologically and hydrologically critical to gathering and gradually releasing the water that fills larger rivers and lakes, in the process removing pollutants and sediments. Judy L. Meyer et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7, 10-15 (2003).[6] Downstream water quality depends on the protection of upstream areas and suffers if they are degraded. *See, e.g.*, Bruce J. Peterson et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 Science 86, 89 (April 6, 2001) ("Restoration and preservation of small stream ecosystems should be a central focus of management strategies [to] . . . improve the quality of water delivered to downstream lakes, estuaries, and oceans" because nitrogen processing is much more rapid and effective in headwater tributaries"); EPA Region 3 Comments on Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" ("ANPRM") at 7 (pathogens from upstream sewage treatment facilities located on smaller order tributaries, such as many of the facilities in the Mid-Atlantic region, can survive long distances and end up in downstream drinking water); EPA Region 6 ANPRM Comments, Enclosure at 1.[7]

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[6] This publication is available at http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182.

[7] On January 15, 2003, EPA and the Corps jointly published this advanced notice seeking public comment and soliciting technical information on potential regulatory changes or clarification in light of the Court's decision in *SWANCC*. 68 Fed. Reg. 1991 (Jan. 15, 2003). The

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Tens of thousands of NPDES permits have been issued across the nation, primarily by state agencies in the 45 states that have been delegated such permitting authority by EPA. Many of these permits regulate discharges into non-navigable tributaries, including discharges from both industrial processes and municipal sewage treatment facilities. *See, e.g.*, EPA Region 6 ANPRM Comments, Enclosure at Table 2. If the Court were to hold that distant, intermittent or artificial tributaries to navigable waters are excluded from the definition of "waters of the United States," many – if not most – of the nation's waters would lose the important protections of the NPDES program, virtually overnight. *See, e.g.*, EPA Region 1 ANPRM Comments, Attachment at 12 (explaining that publicly owned treatment works in New England could freely discharge poorly treated sewage if the NPDES program does not cover tributaries); EPA Region 9 ANPRM Comments at 12-13 (noting that major discharge sources in the region, such as mines and sewage treatment plants, would lose NPDES protection). For instance, Missouri has over 84,000 miles of intermittent/ephemeral streams and 82 percent of the state's NPDES permittees discharge to these streams; limiting the reach of the Clean Water Act to

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agencies received roughly 130,000 comments from the states, regional EPA offices, various stakeholders, and the general public overwhelmingly opposed to any regulatory change that would restrict the scope of the current definition. In this brief, *amici* cite to several of the federal and state agency comment letters, which are available at http://www.earthjustice.org/backgrounder/display.html?preview=yes&ID=143 (EPA regional office comments) and http://www.earthjustice.org/backgrounder/display.html?ID=68 (individual state comments), respectively, and are referenced herein as "ANPRM Comments." Ultimately, EPA decided not to move forward with any regulatory changes. *See* http://www.epa.gov/owow/wetlands/guidance/SWANCC/.

traditionally navigable waters could affect more than 76 percent of the state's headwaters or intermittent streams. Missouri ANPRM Comments at 2. Likewise, approximately 75 percent of the stream miles in Texas are intermittent and roughly 48 percent of the NPDES-permitted wastewater discharges flow into such intermittent streams. Texas ANPRM Comments at 2.

Indeed, while there are no definitive estimates of the nationwide impacts from the loss of Clean Water Act coverage for tributary systems and their adjacent wetlands, the numbers are likely quite high. In the New England region alone, EPA estimates that approximately 35,000 miles of non-navigable tributaries (and approximately 2,140,000 acres of their adjacent wetlands and other waters) would lose protection. EPA Region 1 ANPRM Comments at 3. On the other side of the continent, the State of Arizona has estimated that 95 percent of its surface waters are intermittent or ephemeral, all of which would fall outside the narrow definition that Petitioners advance, Arizona ANPRM Comments at 1, and the State of Montana estimates that limiting the definition of navigable waters to perennial or traditionally navigable rivers would eliminate Clean Water Act coverage for 71 percent of the state's stream miles. Montana ANPRM Comments at 4-5. In the nation's heartland, the same concerns hold true; for example, the State of Nebraska estimates that it would lose regulatory oversight of 76 percent of its waterways under even an "extremely conservative estimate" of the reach of a definition change. Nebraska ANPRM Comments at 2. Thus, virtually every region of the country would be significantly impacted by a narrowing of Clean Water Act jurisdiction, and many of the potentially unprotected waters serve as sources of drinking water. *See, e.g.*,

EPA Region 3 ANPRM Comments at 6 and Table 1 (demonstrating that between 148 and 526 surface drinking water intakes, serving populations ranging from 535,000 to 3 million people, are in headwaters streams and thus potentially affected by restrictions on Clean Water Act jurisdiction).

Elimination of Clean Water Act jurisdiction over non-navigable tributaries and their adjacent wetlands also would have a significant adverse effect on EPA's enforcement program, calling into question pending wetlands and NPDES enforcement cases. *See* EPA Region 1 ANPRM Comments at 14; EPA Region 9 ANPRM Comments at 12-13 (describing several such vulnerable enforcement actions). For instance, in *United States v. Eidson*, 108 F.3d 1336 (11th Cir.), *cert. denied*, 552 U.S. 899 (1997), a used oil company intentionally pumped industrial wastewater sludge containing priority pollutants into a storm sewer that drained into a storm drainage ditch which eventually emptied into Tampa Bay. The Eleventh Circuit upheld defendants' convictions, citing *Riverside Bayview* and EPA's long-established definition of "waters of the United States" to conclude that non-navigable tributaries to navigable waterways are covered by the Clean Water Act. *Id.* at 1342 (noting that "[p]ollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes"). Similar examples, spanning three decades of remarkable judicial consistency across the country, abound.[8] Petitioners' proposed reading of the term

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[8] *See, e.g., Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533-34 (9th Cir. 2001) (discharge of pesticide into irrigation canal without NPDES permit); *United States v. TGR Corp.*, 171 F.3d 762, 764-65 (2d Cir. 1999) (criminal conviction for the knowing discharge, without a permit, of asbestos waste slurry into a drain that flowed into

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"navigable waters" would imperil such enforcement actions and the nation's waters.

There simply is no question that "[n]atural and altered streams can serve as water pollution conduits, whether continuous or intermittent in their flow" and that "[m]an-made structures [such as ditches] ... have the same practical effect of direct connectivity in being pollution conduits." EPA Region 5 ANPRM Comments at 3. *See also* EPA Region 9 ANPRM Comments at 8-9 (explaining that nearly 20,000 miles of constructed drains and canals in California's Central Valley lie upstream of drinking water supplies for much of the state's population). The loss of section 402 protections for such non-navigable tributaries would set the country's water quality efforts back "to pre-1960's levels." EPA Region 7 ANPRM Comments at 5.

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a channelized brook that flowed into a tributary to the Long Island Sound); *Quivira Mining Co. v. U.S. Environmental Protection Agency*, 765 F.2d 126 (10th Cir. 1985) (uranium mining company discharge of pollutants into short-distance gullies or "arroyos"); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979) (unpermitted discharge of oil); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) (illegal discharge of toxic sodium cyanide-sodium hydroxide solution from gold mine leaching operation into a non-navigable creek); *United States v. Ashland Oil*, 504 F.2d 1317, 1325 (6th Cir. 1974) (conviction for the discharge of oil without a permit into an unnamed, non-navigable tributary where its waters flowed through three other waterways before reaching a navigable river); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (discharge to storm drain that flowed into tributary of navigable stream); *State of Georgia v. City of East Ridge*, 949 F. Supp. 1571 (N.D. Ga. 1996) (sewage discharge into storm drain that flowed to unnamed tributary of navigable-in-fact river); *United States v. St. Bernard Parish*, 589 F. Supp. 617 (D.C. La. 1984) (discharge to canal pumped to open water pools adjacent to wetland that was adjacent to navigable river).

C. Other Clean Water Act Provisions Are Similarly Dependent on a Broad Interpretation of Navigable Waters.

Sections 402 and 404 are not the only Clean Water Act programs whose effectiveness turns on the phrase "waters of the United States." For example, section 304 of the Clean Water Act mandates that, for navigable waters, states adopt and EPA approve water quality standards that "protect the public health or welfare [and] enhance the quality of water . . . taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). Additionally, states must develop "total maximum daily loads" ("TMDLs") for any waters that do not meet these standards and must implement these TMDLs through "waste allocations" incorporated into NPDES permits and their non-point source planning efforts. *Id.* § 1313(d).

Because many NPDES permit holders discharge into tributary streams, a statutory reinterpretation that leaves these streams unregulated will increase the pollutant load in downstream waters, leading to TMDL violations. *See, e.g.*, California ANPRM Comments at 9; Arizona ANPRM Comments at 3; Delaware ANPRM Comments at 14; Rhode Island ANPRM Comments at 1-2. For example, in the Christina River Basin that spans Pennsylvania, Maryland, and Delaware, TMDL modeling and analysis demonstrate that nutrients, dissolved oxygen, and dioxin all move into the river from upstream tributaries and must be controlled at their source to effectuate the clean-up envisioned by section 304. EPA Region 3 ANPRM

Comments at 14-15. *See also* EPA Region 1 ANPRM Comments at 13 (discussing effects on TMDL efforts to restore Long Island Sound).

Many other Clean Water Act programs would be similarly impacted by Petitioners' cramped interpretation of "navigable waters." For instance, section 401, 33 U.S.C. § 1341(a), requires states to certify that applications for federal permits and licences involving discharges into "navigable waters" will comply with the standards of the Clean Water Act. Because states often do not have the legal authority or the resources to step in and directly regulate the destruction of wetlands,[9] many have historically relied on section 401 as the primary mechanism for protecting wetlands and riparian areas. *See, e.g.*, Arizona ANPRM Comments at 3; California ANPRM Comments at 3; Hawaii ANPRM Comments at 3; Indiana ANPRM Comments at 8; Iowa ANPRM Comments at 2; Kentucky ANPRM Comments at 1; Maine ANPRM Comments at 1; Nebraska ANPRM Comments at 4; South Carolina ANPRM Comments at 1; Texas ANPRM Comments at 4; Wyoming ANPRM Comments at 5-6. The oil and hazardous substance discharge liability provisions of the Clean Water Act and the Oil Pollution Act also turn on the definition of "navigable water," 33 U.S.C. §§ 1321(b), 2702(a), as do provisions regulating sewage treatment facility discharges, 33 U.S.C. § 1345(a), and non-point source planning provisions. 33 U.S.C. § 1319(a). Each of

[9] Nebraska, for instance, protects only 2 percent of its wetlands through state programs, Nebraska ANPRM Comments at 4, and South Carolina has no regulatory program in place for 99 percent of its wetlands. South Carolina ANPRM Comments at 1. California, Wyoming, Montana, Arizona, and Texas have no state law in place. Respective State ANPRM Comments at 3, 6, 5, 2, and 4.

these programs is threatened if Petitioners' interpretation is adopted.

"Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source,'" *Riverside Bayview*, 474 U.S. at 132-33, and the legislative history of the Clean Water Act plainly evinces Congress' intent to control pollution in both navigable waters "and their tributaries." S. Rep. No. 92-414, at 77 (1972). Because tributary systems and their adjacent wetlands are "inseparably bound up with 'waters' of the United States," they fall within the statute's jurisdiction as already construed by this Court in *Riverside Bayview*, 474 U.S. at 134. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) (Clean Water Act "applies to virtually all surface water in the country"). *SWANCC* did not overrule *Riverside Bayview* nor did it otherwise alter this fundamental proposition.

II. THE FEDERAL GOVERNMENT'S CONSISTENT INTERPRETATION OF CLEAN WATER ACT JURISDICTION HAS RESULTED IN A ROBUST FEDERAL-STATE PARTNERSHIP FOR PROTECTING WATER QUALITY.

Petitioners contend that the government's application of the Clean Water Act to the facts of these cases "gives the Corps extraordinary power to regulate matters that have traditionally been exclusively reserved for regulation by the States" and "will extend federal authority over an enormous expanse of land." Petitioners' Brief in *Carabell* at 14. Such heated rhetoric incorrectly suggests that the Corps has engaged in an alarming departure from long-established regulatory practices. In truth, however, EPA

and the Corps have for decades interpreted the Clean Water Act's jurisdiction to reach tributary systems and their adjacent wetlands, such as the ones at issue here. The Court's decision in *SWANCC* does not dictate a different course now. Petitioners' call to ignore decades of settled judicial interpretation would effect a major shift in regulatory policy and largely leave the states adrift to regulate tributary systems and their adjacent wetlands at their own expense and on an *ad hoc* basis – precisely the failed regime that Congress overrode with passage of the Clean Water Act in 1972.

A. EPA and the Corps Have Consistently Asserted Jurisdiction Over Tributaries and their Adjacent Wetlands for Three Decades.

Soon after enactment of the Clean Water Act, EPA broadly defined "navigable waters" to include all navigable waters of the United States and all tributaries of such waters, as well as interstate waters and a variety of intrastate waters connected to interstate commerce. 38 Fed. Reg. 13,527, 13,529 (May 22, 1973). As then-EPA Administrator Russell Train later explained, "aquatic systems are . . . interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource." *Section 404 of the Federal Water Pollution Control Act Amendment of 1972: Hearings Before the Sen. Public Works Comm.*, 94th Cong., 41 (July 27, 1976) (Testimony of EPA Administrator Russell Train), at App. 15.[10]

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[10] Although EPA's original definition did not expressly identify "wetlands" as "navigable waters," the agency contemporaneously issued a policy statement noting that wetlands "represent an ecosystem of unique and major importance to citizens of this Nation" which require

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After a short-lived, narrower Corps interpretation of "navigable waters" was criticized by EPA[11] and rejected by the courts,[12] today's more comprehensive definition was developed and refined. *See* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Waters and to Their Adjacent Wetlands*, 34 Env. L. Rev. 10187, 10211 (2004) (explaining Corps' 1974 actions). Consistent with EPA's regulations and the statute's legislative history, the Corps revised its earlier definition to give the term its "broadest possible constitutional interpretation." 40 Fed. Reg. 19,766 (May 6, 1975) (citing S. Rep. No. 92-1236, at 144 (1972)).[13] That definition, finalized in interim form a few months later, included "[a]ll tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark," as well as wetlands that are "contiguous or adjacent to other navigable waters." 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). Where necessary to protect

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"extraordinary protection." 38 Fed. Reg. 10,834 (May 2, 1973). Accordingly, EPA announced its policy to "preserve the wetland ecosystems and to protect them from destruction through waste water or nonpoint source discharges regarding protection of wetlands" and to "minimize alterations in the quantity or quality of the natural flow of water that nourishes wetlands and to protect wetlands from adverse dredging or filling practices." *Id.*

[11] *See* Letter from EPA Administrator Russell E. Train to Corps Lt. Gen. W.C. Gribble, Jr. (Jan. 15, 1974), at App. 24-27.

[12] *Natural Resources Defense Council, Inc. v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975) (invalidating regulations promulgated at 39 Fed. Reg. 12115, 12119 (April 3, 1974)).

[13] The House Report contained similar language, noting that "[t]he committee fully intends the term "navigable waters" to be given the broadest possible constitutional interpretation." H.R. Rep. No. 92-911, at 131 (1972).

water quality, the Corps District Engineer would determine jurisdiction over intermittent rivers, streams, tributaries, and non-adjacent perched wetlands. *Id.* EPA simultaneously proposed complementary guidance for evaluating dredge and fill permit applications for discharge to wetlands. 40 Fed. Reg. 19,794 (May 6, 1975). EPA explained that the program would protect "wetlands which are especially valuable for propagation and support of fish and wildlife, as well as other beneficial uses ... [from] capricious development [that is] having a major impact on the aquatic life and wildlife of the United States, and other water uses." *Id.* These guidelines, which mirrored the Corps' regulations, were issued in interim final form a few months later. 40 Fed. Reg. 41,294 (Sept. 7, 1975).

Since adoption of these early implementing regulations, the agencies' interpretation of "navigable waters" has remained remarkably stable. In 1977, the Corps amended the definition of "navigable waters" in order to "make the policies and procedures more understandable to a person desiring to perform work in the waters of the United States." 42 Fed. Reg. 37,122 (July 19, 1977). The 1977 amendment did not expand the Corps' jurisdiction, but merely aimed to resolve confusion as to which waters were subject to jurisdiction, including wetlands adjacent to navigable waters or their tributaries, as well as other waters "the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. at 37,144.[14]

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[14] The 1977 clarification provided the first definition of "adjacent," defined as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 42 Fed. Reg. at 37,144.

In 1979, the EPA issued the definition of "waters of the United States" that, with only minor modifications, remains in effect today. 44 Fed. Reg. 32,854, 32,901 (June 7, 1979); 33 C.F.R. § 328.3(a). In 1986, the Corps adopted the EPA definition. *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); 40 C.F.R. § 230.3(s). These definitions largely parallel the original 1975 and 1977 definitions.

In sum, the Corps and EPA have consistently interpreted the jurisdictional reach of the Clean Water Act's integrated and comprehensive pollution control programs, and the courts have largely followed suit. *See, e.g., United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), *petition for cert. filed*, 74 USLW 3309 (U.S. Nov. 11, 2005) (No. 05-623) (wetlands drained by a ditch that ran into non-navigable creek that ran into non-navigable river, which in turn ran into navigable river are "waters of the United States"); *In re Needham*, 354 F.3d 340 (5th Cir. 2003) (drainage canal adjacent to navigable-in-fact water constitutes "navigable water"); *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003) (wetland that drains intermittently into manmade waterway that empties 2.4 miles later into navigable-in-fact water subject to CWA jurisdiction); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (wetlands adjacent to roadside ditch that eventually empties into navigable-in-fact waters subject to Clean Water jurisdiction); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (wetlands subject to Clean Water Act jurisdiction); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (wetlands adjacent to lake are "navigable waters"); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (Clean Water Act jurisdiction extends at least to waters which are no longer subject to tidal inundation because of dikes). Such contemporaneous and long-standing administrative construction carries

special weight. *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 (1931).

B. If Adopted, Petitioners' Arguments Threaten to Disrupt the Clean Water Act's Cooperative Federalism Scheme and Unduly Burden the States.

The Clean Water Act, as originally drafted and subsequently implemented, does not impinge on any traditional area of state regulation, but rather, constitutes a classic example of cooperative federalism. The statute manifests Congress' embrace of a "partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). By its explicit terms, the statute preserves and allocates substantial roles to state governments, but also provides for federal regulation of polluting activity. *See* 33 U.S.C. § 1342(b) (giving states the presumptive right to take over administration of the Act's discharge permit program); 33 U.S.C. § 1342(g) (similarly giving states the presumptive right to take over the federal "dredge and fill" program); 33 U.S.C. § 1370 (setting forth savings clause preserving state authority to protect waters more stringently than federally required). In many states, including the one at issue here, the federal-state partnership envisioned by Congress has become a working reality over the last thirty years, with federal and state water protection laws integrated into one "seamless" and streamlined regulatory process, reducing permit application costs and time. *See, e.g.*, Michigan ANPRM Comments at 14;

Delaware ANPRM Comments at 15; Vermont ANPRM Comments at 2.

Given these long-established regulatory relationships, many states oppose the shrinking of federal protection over the nation's waters. As Nebraska explained to EPA, "staggering economic difficulties for the states mean the additional burden would strain state resources and dramatically reduce our ability to protect the waters of the State." Nebraska ANPRM Comments at 1. *See also* Arizona ANPRM Comments at 3 ("Given the ongoing budget concerns of our state and many others, creation of such programs and partnerships is unlikely in the near future"); Montana ANPRM Comments at 5 ("A Federal basis of support for implementation of water quality protection efforts in Montana is critical in light of the state's limited regulatory resources."). Other states have expressed similar views. *See, e.g.*, California ANPRM Comments at 9; Maine ANPRM Comments at 1; North Carolina ANPRM Comments at 6; Wyoming ANPRM Comments at 5. To overturn thirty years of settled expectations here would, in effect, impose an enormous unfunded mandate on the states.

Even in the absence of budgetary woes, other practical constraints prevent states from filling EPA's and the Corps' regulatory shoes. In some states, regulatory agencies are actually forbidden from imposing any regulations stricter or more extensive than federal regulations. *See, e.g.*, Texas ANPRM Comments at 4. Elsewhere, the withdrawal of federal jurisdiction likely means that "a patchwork quilt of uneven regulations will threaten overall water quality." Indiana ANPRM Comments at 1-2. Moreover, the states themselves recognize that without the "level playing field" created by the Clean Water Act, many

states will feel economic pressure to engage in a race to the bottom, loosening water regulations to compete with other states. Delaware ANPRM Comments at 14; Tennessee ANPRM Comments at 2-3. But even individual states with adequate resources, legal authority and the political will to fill the void cannot regulate beyond their own boundaries, a serious limitation in the integrated watersheds of North America where virtually every state is affected by upstream polluting activities in another jurisdiction. There is thus no compelling reason for the Court to rewrite the statutory federal-state balance struck by Congress.

III. PETITIONERS' REAL ESTATE DEVELOPMENTS AND THE ACT'S PROTECTIONS BOTH IMPLICATE COMMERCIAL ACTIVITIES, OVERCOMING CLAIMED COMMERCE POWER CONCERNS.

These cases do not implicate legitimate constitutional concerns. The pervasively commercial real estate development activities at issue in *Rapanos* and *Carabell*, the Clean Water Act's protections of commercial activities dependent on America's waters, and the Corps' underlying regulatory judgments about Petitioners' impacts on water quality easily satisfy any constitutional test linked to the Commerce Clause. Petitioners' plans are reachable under both the "channels of interstate commerce" and the "substantially affect" interstate commerce rationales. They also involve "Necessary and Proper" assertions of federal power to protect legitimate federal interests.

First, unlike the isolated, unconnected waters at issue in *SWANCC*, the waters in these cases are protectable as part of the "channels of interstate commerce." *See United*

States v. Lopez, 514 U.S. 549, 558-59 (1995). Petitioners' actions involve the filling of wetlands that are proximate or directly connected to tributary ditches which act as conduits to traditional navigable-in-fact waters. The degradation of small stream tributaries can collectively harm agricultural, municipal, and riparian uses of such waters, as well as innumerable businesses dependent on interstate travelers who seek pristine fishing streams, small boat recreation, and swimming opportunities in waters often miles from traditional "navigable-in-fact" waters. *See, e.g.*, EPA Region 10 ANPRM Comments at 4-5. As Judge Posner observed in the factually similar *Gerke* case, "the sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect." *Gerke*, 412 F.3d at 806 (citations omitted).

Under the "channels" rationale, this Court has long recognized federal power to "insure the convenient and safe navigation of all the navigable waters of the United States," including efforts to "remov[e] . . . obstructions to their use." *The Daniel Ball*, 77 U.S. 557, 564 (1871). *See also United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940) ("To make its control effective the Congress may keep 'the navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets."). This power reaches to activities in non-navigable waters necessary to protect navigable-in-fact waters. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) (recognizing federal power under the Commerce Clause to reach watersheds due to their link to "flood control on navigable streams and their tributaries"). Once "channels

of interstate commerce" are implicated, congressional power can be asserted to "keep the channels of interstate commerce free from immoral and injurious uses," even where a defendant's conduct is itself not commercial. *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

Second, under the third category of Commerce Clause power analysis, the federal government also has "the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. As the Court recently explained, Congress can even regulate "purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Gonzalez v. Raich*, 125 S. Ct. 2195, 2206 (2005). In assessing federal power under a category three Commerce Clause analysis, the Court looks to the particular activities being regulated as well as the commerce-related activities protected by the statute. *See, e.g., Raich*, 125 S. Ct. at 2209 (distinguishing *Lopez*, which involved a "brief, single-subject statute making it a crime for an individual to possess a gun in a school zone"); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (explaining that "the noneconomic, criminal nature of the conduct at issue" in *Lopez* was "central" to the Court's decision there). In the recent *Raich* case, for example, the Court focused on how Congress' comprehensive regulation of the illegal drug market implicated commerce in numerous ways, contrasting the statute in *Morrison*, whose focus on gender-motivated crimes of violence "did not regulate economic activity." *Raich*, 125 S. Ct. at 2210-11.

The Clean Water Act's explicit text calls for Commerce Clause analysis of the activities causing harm, here polluting conduct, as well as commercial and economic activities dependent on the "chemical, physical and biological integrity" of America's waters. 33 U.S.C. § 1251(a). The factual setting of *Rapanos* and *Carabell*, where commercial real estate developers sought to fill wetlands for profit, undoubtedly involves the sorts of economic and commercial activity so completely lacking in *Lopez* and *Morrison*. Moreover, as the Court recognized in *Riverside Bayview*, adjacent wetlands and tributaries such as those at stake here fulfill numerous commercially and economically significant "hydrological" functions, thereby overcoming any commerce power objections. *See also Gerke*, 412 F.3d at 806-08 (rejecting similar constitutional attack and stating the "power of Congress to regulate pollution is not limited to polluted navigable waters"); *Deaton*, 332 F.3d at 704-08 (finding fill of wetlands flowing into ditch threatened "aggregate effects" with other similar actions and was reachable because action implicated "channels of interstate commerce"); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (analyzing the harmful activities regulated, the activities contingent on regulatory protection, and the need to reach intrastate activities as an essential part of a larger regulation of economic activity).

Regulation of the class of pollution discharges at issue here lies within the government's Commerce Clause power because it is part and parcel of a "comprehensive" regulatory scheme intended to control polluting harms and protect the manifold uses of America's waters. *Raich*, 125 S. Ct. at 2206 ("the *de minimis* character of individual instances arising under [the] statute is of no significance"). As it did in *Raich*, the Court should decline entreaties to

"excise individual applications of a concededly valid statutory scheme." *Id.* at 2209. These cases are unlike *Lopez* and *Morrison*, where the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. *Id.*

Finally, the federal government also can protect downstream commercial and economic uses of waters pursuant to the Necessary and Proper Clause, which allows "Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled.'" *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring). Congress has the power to "facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants," even where the activity is "noneconomic." *Raich*, 125 S. Ct. at 2216, 2217 (Scalia, J., concurring) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937)).

Petitioners' constitutional arguments thus rest in their entirety on taking a few clauses in *SWANCC* out of context, while virtually ignoring *Raich*, and claiming, in effect, that *SWANCC* rewrote well-established Commerce Clause precedents. The *SWANCC* Court alluded to potential Commerce Clause concerns under its particular facts, but declined to analyze the "object or activity that, in the aggregate, substantially affects interstate commerce," apparently questioning the timeliness of government arguments. *Id.* at 173. In light of constitutional concerns, the *SWANCC* Court merely read the statute as not encompassing regulation under the "Migratory Bird Rule." *Id.* at 173-74. The cases now before the Court, in contrast, do not involve isolated ponds, and do not now rely on the

Migratory Bird Rule, but involve private commercial real estate development, with fill into "adjacent wetlands" and tributaries that are significantly different in their locations and commercial functions from the isolated *SWANCC* waters. Much as this Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275-83 (1981), rejected a Commerce Clause attack on a federal mining law because that law involved underlying commercial activity causing harms, market competition that could spur destructive activity, and many beneficial uses of resources potentially threatened by mining harms, the Court should similarly reject Petitioners' misguided constitutional arguments here.

IV. AS THE COURT RECOGNIZED IN *RIVERSIDE BAYVIEW*, DEFERENCE TO THE AGENCIES' REGULATORY INTERPRETATIONS AND ECOLOGICAL JUDGMENTS IS WARRANTED.

Petitioners' claims boil down to an attack on the statutory interpretations and regulatory judgments of the Corps and EPA. Those agency judgments consist of both longstanding regulatory interpretations and site-specific assessments about Petitioners' particular lands, waters, and planned activities. It is for the implementing agencies, not the courts, to define the "precise bounds of regulable waters" by exercising their "ecological judgment about the relationship between waters and their adjacent wetlands." *Riverside Bayview*, 474 U.S. at 134. The exercise of that ecological judgment is precisely what occurred in these cases. As it did in *Riverside Bayview*, the Court should defer to the agencies' scientific judgments and "technical expertise" about "biological functions" and the "aquatic environment" under the principles set forth in *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). *Id.* at 131, 134.

Petitioners advance two slightly different, but equally unpersuasive, rationales for overriding the Court's prior conclusion in *Riverside Bayview*. In *Rapanos*, Petitioners argue that some greater hydrologic connection than the one determined by the Corps to exist in this instance is necessary to establish Clean Water Act jurisdiction. They posit that a closer geographic proximity between tributaries and downstream navigable-in-fact waters is required, but they offer neither an appropriate test for determining acceptable proximity nor any legislative, regulatory or judicial support for their position. In reality, the hydrologic connection that the Court discussed at length in *Riverside Bayview* was not spatial or geographic, but functional. *See Riverside Bayview*, 474 U.S. at 132-35. If the courts begin usurping the proper role of the agencies in determining these functional hydrologic connections at particular sites, they will likely find themselves in the line-drawing business for many years to come.

The *Carabell* Petitioners pursue a different tack, asking the Court to second-guess the ecological judgment of the Corps with respect to the ability of their man-made berm to isolate an admittedly adjacent wetland and thereby cut off Clean Water Act jurisdiction. This Court firmly rejected such a case-by-case approach in *Riverside Bayview*, upholding agency jurisdiction over the *class* of adjacent wetlands because the Corps "has concluded" that such wetlands "*may function* as integral parts of the aquatic environment." *Riverside Bayview*, 474 U.S. at 135 (emphasis added). The Court was untroubled that some adjacent wetlands might not be "significantly intertwined with the ecosystem of adjacent waterways." *Id.* at 135,

fn.9.[15] It was enough that such waters "*tend* to drain" into waters, "*may serve* to filter and purify water draining into adjacent bodies of water," or "*may serve*" important biological functions. *Id.* at 134-35 (emphasis added). The Court's holding in that case and the basic principles of *stare decisis* dictate the same result here.

CONCLUSION

The decisions of the Sixth Circuit Court of Appeals in these consolidated cases should be affirmed in their entirety.

Dated: January 13, 2006

Respectfully submitted,

DEBORAH A. SIVAS
LAWRENCE C. MARSHALL*
HOLLY D. GORDON
STANFORD LAW SCHOOL
ENVIRONMENTAL LAW CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305
(650) 724-1900

WILLIAM W. BUZBEE
Gambrell Hall
1301 Clifton Road
Atlanta, Georgia 30322
(404) 727-6507

**Counsel of Record*

[15] If in any particular case the filling of an adjacent wetland will not appreciably impact water resources, the developer can simply obtain a section 404 permit and proceed.

SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

HEARINGS
BEFORE THE
COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS
SECOND SESSION

JULY 27 AND 28, 1976

SERIAL NO. 94-H49

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SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

TUESDAY, JULY 27, 1976

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
Washington, D.C.

The committee met at 7:12 p.m., pursuant to call, in room 4200, Dirksen Senate Office Building, Hon. Jennings Randolph (chairman of the committee) presiding.

Present: Senators Randolph, Muskie, Burdick, Hart, Baker, and Domenici.

OPENING STATEMENT OF HON. JENNINGS RANDOLPH, U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator RANDOLPH. Good evening, ladies and gentlemen.

The Committee on Public Works this evening and also tomorrow evening will conduct two hearings on a difficult subject as we review the environmental problems with which the Congress is faced.

We hope to further our understanding of the problem or problems and to receive recommendations for an effective resolving of these issues.

The situation has arisen, as members of the committee know, from the Water Pollution Control Act Amendments of 1972, section 404 of that legislation requires the Army Corps of Engineers to issue permits for the disposal of dredge and fill material in our navigable waters.

When we wrote the act, we were concerned primarily or even solely with controlling the way in which these materials were disposed. Dredge and fill materials often are highly contaminated, and thus a situation should be addressed in the terms of water pollution control.

All the members of the committee have expressed an interest in this subject, and we are appreciative that many of them arranged their schedules to be here tonight.

We did not understand earlier that a judicial decision would subsequently broaden the impact, as I have referred to it, of section 404. As a result of the action in the courts, the Corps of Engineers has set down regulations covering an extensive range of activities. These are proposed to be

implemented in three phases. The first phase has already gone into effect. The regulations covering phase two were to have been implemented on July 1, but were ordered postponed by the President pending action in the Congress.

These hearings have been planned by the committee to review the implication of the Corps of Engineers' regulations. Legislation has been adopted by the House of Representatives, and there are proposals pending in the Senate.

The witnesses counseling with us during these two evenings represent a broad spectrum of affected parties. I am sure all members of the committee welcome the opportunity to hear the witnesses and discuss with them in dialog the problems that we know are necessary to be discussed. The exchange, I am sure, between members of the committee and those who testify will be helpful, as well as the formal statements.

Senator Robert Dole of Kansas is at the witness table. We are prepared to hear his testimony at this time.

Are there comments from members of the committee? Senator Muskie?

OPENING STATEMENT OF HON. EDMUND S. MUSKIE, U.S. SENATOR FROM THE STATE OF MAINE

Senator MUSKIE. I have a brief statement which I hope will be helpful. I had hoped that the Senate could defer until next year consideration of the substantive issues associated with the 1972 Clean Water Act.

Unfortunately, much of the debate, much of the regulations, and much of the suggested legislative responses stem from what I regard as a misinterpretation of congressional intent.

Section 404 is designed to require the corps, because of their existing authority to maintain navigation, to regulate the dumping of polluted dredge spoil at specified disposal sites, the EPA having veto power over the selection of the sites. That was the intent precisely and specifically stated.

Section 404 was an exception to the otherwise comprehensive regulatory program embodied in section 402. But implementation of section 404 has not led to the end of open water dredge spoil discharge, which was the specific objective of section 404.

No specified disposal sites have been established. Instead, the section 404 regulations have led to confusion, irritation, and divisiveness that have undermined the confidence in the basic Federal role in water pollution control.

They have created a perception of needless interference in the affairs of farmers, foresters, miners, and ranchers whose activities were by no means comprehended as coming under the section of 404 when it was written.

At this point, the most appropriate course of action for this committee may be to strike section 404, eliminate this exception, and return to the basic regulatory structure anticipated by the act.

If we adopted this course, dredge, spoil, and fill would be considered pollutants. Where they are discharged, they would be regulated by the Environmental Protection

Agency or the States. Where they are nonpoint sources, they would be regulated by the States pursuant to section 208. This was the original position of the Senate in 1972.

Given all the problems that section 404 has created, perhaps it should be in its saddest position now. I am not wedded to this position, My mind is open, whatever my emphasis may indicate to the contrary.

I hope the statements of our witnesses will help clarify these issues and provide us with a course of action which will preserve our ability to regulate the disposition of polluted dredge spoil without creating another unnecessary duplicated Federal regulatory program.

Senator RANDOLPH. Thank you Senator Muskie, for your continuing leadership on the committee. We are grateful as members of our committee and the Senate as well.

Senator Baker, do you have any comments?

Senator BAKER. Mr. Chairman, I have no prepared statement at this time. Possibly I will have suggestions to make as we proceed. But I prefer to hear the testimony of the witness.

Senator RANDOLPH. Thank you, Senator Baker.

Senator Hart?

OPENING REMARKS OF HON. GARY HART, U.S. SENATOR FROM THE STATE OF COLORADO

Senator HART. Mr. Chairman, I have no prepared statement. As with other members of the Senate, I have my own proposal which I will be discussing with this

committee and perhaps the full Senate on section 404 to deal with problems that Senator Muskie has so articulately identified.

It is a classic of a case that all of us in the Congress are faced with time and time again: the congressional intent and administrative implementation, between which there seems to be a gap.

The people of the country are upset. We are upset. Somehow the Congress and the executive branch must get together on the laws that are passed and implemented to free the people of this country from what they definitely consider to be burdensome regulations.

I think all of us have the same intent. We are here to try to solve that problem.

Senator RANDOLPH. Thank you, Senator.

Senator Domenici?

Senator DOMENICI. I have no comments, Mr. Chairman. Thank you.

Senator RANDOLPH. For the record, Governor Marvin Mandel of the State of Maryland had indicated to the committee that he would appear this evening and would address himself to the subject matter, not as a Governor of that State but for the National Governors' Conference.

The change of time and other commitments made it impossible for Governor Mandel to be with us tonight. He has submitted testimony which will be a part of our record. Did the Governor provide copies so that they might be available to those who will be covering the hearing or interested parties? Do you have knowledge of that?

Mr. MEYER.[1] Yes, sir.

Senator RANDOLPH. There are copies, then.

[The statement of the National Governor's Conference follows]

* * *

Russell Train, Nathaniel Reed, Victor Veysey, and Peter Taft – are men of stature. They are men who have certain authority and leadership which we all recognize, I am sure that their testimony will bring forth colloquy which will help to bring out the points of view they present.

Would you gentlemen please come forward as a panel?

Thank you, gentlemen.

Off the record.

[Discussion off the record.]

Senator RANDOLPH. The members of the panel, as I have indicated, are men of stature and leadership. Mr. Train, would you proceed to give us your thinking as the Administrator of the Environmental Protection Agency?

STATEMENTS OF RUSSELL TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; NATHANIEL REED, ASSISTANT SECRETARY OF THE INTERIOR FOR FISH AND WILDLIFE AND PARKS; VICTOR VEYSEY, ASSISTANT SECRETARY OF ARMY FOR CIVIL WORKS ; AND PETER TAFT, ASSISTANT ATTORNEY GENERAL FOR LAND AND NATURAL RESOURCES

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[1] Mr. Barry Meyer, Chief Counsel, Senate Public Works Committee.

Mr. TRAIN. Thank you, Mr. Chairman and members of the committee. I have what at least seems to me in comparison to some of the other statements a relatively short statement. Since I come first, I propose to read the full statement, with your permission. Since Governor Mandel is not appearing, perhaps I can use, part of his time, although we may not say the same thing.

I am here today to discuss with you our continuing efforts to achieve the goals of the Federal Water Pollution Control Act in the context of one specific program – the regulation of discharges of dredged or fill material under section 404.

Needless to say, I am just delighted that this committee has called this hearing. I think that this has been long overdue. The issues are complex. They need resolution. I think the fact that the committee is willing to gather at this late hour to take up this issue is just extraordinarily commendable. The amount of interest which is evident in the size of the audience here I think speaks to the importance of the issue in the public mind.

With the passage of the 1972 amendments to the FWPCA, our fundamental objective became the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.

Full implementation of the 404 decisionmaking process is imperative if we are to achieve that goal. Section 404 represents an essential tool for moderating the degradation, and sometimes the irrevocable destruction, of aquatic areas that naturally control the quality of water, including those vital areas of shallow water known as wetlands.

I might add that if we did not have those wetlands, the course of abating pollution in this country by industry and municipalities would be enormously increased because of the additional costs that would be required by the technology to take the place of what nature has provided us.

We welcome the opportunity to participate in dispelling the widespread misinformation that continues to impede constructive debate on this program.

I will direct my brief remarks to three concerns: First, the origin of the program and the much talked about concept of "broad jurisdiction over water"; second, a few of the ecological realities that compel Federal jurisdiction over water; and finally, I will highlight the encouraging first year of implementing a program that is designed to overregulation.

The Federal Water Pollution Control Act places the responsibility upon EPA to administer a permit program for industrial and municipal discharges. The act reserves to the Corps of Engineers a separate permit program under section 404 for discharges of dredged or fill material into the Nation's waters.

The statutory language authorizing the 404 program requires the cooperation of the corps and EPA to insure that discharges of dregded [sic] material and fill material will not have unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, and recreation.

A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes. Several Federal courts have endorsed the wisdom, and constitutionality, of this committee's observation that:

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

In affirming the constitutionality of the statute's jurisdiction over all the Nation's waters in the Ashland Oil opinion, the Court of Appeals for the Sixth Circuit observed:

> We believe that the language of the Federal Water Pollution Control Act and its legislative history show that the United States Congress was convinced that uncontrolled pollution of the Nation's waterways is a threat to the health and welfare of the country, as well as a threat to its interstate commerce.
>
> Obviously water pollution is a health threat to the water supply of the Nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing, for boating, and for swimming. These health and welfare concerns are, of course, proper subjects for Congressional attention because of their many impacts upon interstate commerce generally. (*United Slates v. Ashland Oil*, 7 ERC 1114, 1120 (6th Cir., 1974).)

The court recognized that comprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not

be required to comply with the same procedural and substantive standards imposed upon their downstream competitors.

Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges.

Let me add at this point, Mr. Chairman, that the administration supports the approach of maintaining broad jurisdiction under this program, as set forth under the so-called Cleveland-Harsha amendment offered in the other House, with appropriate amendments.

I believe Mr. Veysey will be prepared to go into more detail on this. But let me just mention in passing that such amendments should provide for delegation to the States under carefully drawn criteria. They should provide for authorization to the Corps of Engineers to exclude insignificant activities. They should insure that permits will only be denied on the basis of adverse impacts on fish and wildlife or other water quality concerns. They should exempt inuse agricultural or silvicultural activities, as would be carefully defined in detail in legislative language.

Mr. Chairman, continued applicability of the 404 program to our Nation's waters is essential if we are to moderate the two most significant types of harm caused by dredged or fill material.

First, just as water uses are degraded by industrial and municipal wastes, adverse effects also occur from dredged and fill materials that contain a wide range of pollutants, including toxic substances.

An initial screening of sediments from over 700 harbor and waterway locations showed that sediments in over

half of the locations contained a significant pollutant load. Pollutants identified in the sampling included lead, arsenic, cyanide, PCB's, mercury, and cadmium.

Contaminated materials threaten water supplies, fisheries and other beneficial water uses unless carefully managed. The corps and EPA are currently using the 404 decisionmaking process to assess the risk of dredging James River sediments that are contaminated with Kepone.

It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks.

Second, unlike most industrial and municipal pollution, dredged and fill material can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds. These critical aquatic areas are essential to many water uses, not the least of which is a viable commercial and sports fishery.

Wetlands serve as spawning and nursery areas while providing natural control of organic and inorganic nutrient transfers that dictate quantity and quality of life in the water. The declining availability of swamps, marshes, and free-flowing streams to assimilate pollution from point and nonpoint sources will greatly increase the dollar and energy costs of maintaining desirable water uses.

For example, discharge of fill material into certain swamps in New York and New Jersey can affect the

quantity and quality of water seeping into the aquifers from which many communities draw their water supply, thereby naturally causing increased treatment costs.

We testified in the July 1975 hearings before the House Subcommittee on Water Resources that the Army Corps of Engineers and EPA had agreed to cooperate in establishing a joint program.

Shortly thereafter, interim final regulations were promulgated by the corps on July 25, 1975. These regulations were followed by the publication of interim final guidelines by EPA on September 5, 1975.

Together the regulations and guidelines establish a manageable program that focuses the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities.

The first year of implementation of the 404 program ended just last Sunday. In view of the attention that has been given to this program in recent months and the misunderstandings that have been voiced by various interest groups, I want to discuss briefly the key features of the program that are preventing overregulation.

First, comprehensive jurisdiction is, we believe, essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrealted [sic] and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

Moreover, this broad geographical jurisdiction should reduce the confusion and expense inherent in earlier jurisdictional approaches that established artificial and

often arbitrary boundaries that included only part of some bodies of water.

For example, the old jurisdictional mean high water line excluded one-half to one-third of most coastal marshes, thus possibly allowing destruction of an essential element of the aquatic system, depending on the degree of control exercised by the States.

Today this problem has been eliminated. The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas. One Florida developer informed us that with the new approach, the location of coastal marshes is less time consuming and less expensive. No longer is it necessary to expend thousands of dollars for tide experts and surveyors to establish the exact mean high water mark as required by the old Corps program.

Second, let me emphasize that while the geographical jurisdiction of the program is broad, hundreds of activities have been identified which do not require permits. The term "fill material" has been defined so as clearly to exclude normal farming, silvictulure [sic] and ranching activities such as plowing, cultivating, seeding, and harvesting. Maintenance of existing fill has also been excluded.

We hope this hearing will help us reassure the public that many activities simply do not require permits.

Third, the 404 program will use general permits to the maximum extent possible to authorize categories of discharge that cause only minimal harm to water quality.

Thus, the need for dischargers to apply for individual permits is eliminated except in those instances involving environmentally significant activities. Several districts

have already issued general permits to authorize erosion control bulkhead and fill and for fills associated with highways and log roads.

Several of our regions have reported a sharp decrease in the number of public notices for permits for insignificant activities under both the 404 program and the 1899 Rivers and Harbors Act.

Fourth, phased implementation of the broad jurisdiction over water has provided a measure of moderation and flexibility we all see as necessary to a reasonable program. A commendable management effort by the Corps of Engineers has already resulted in improved coordination with EPA, other Federal and State agencies, and the public.

I would like to emphasize, I think the Corps has done an outstanding job in moving this program forward and developing reasonable and manageable regulations. You certainly can explore that more fully with them. But I want this committee to know that EPA is strongly supportive of the Corps' effort in this regard and believe that they really have done an outstanding job.

Finally, considerable effort has been made in developing a 404 program that would directly involve the States in the decisionmaking process. Several States with existing permit programs to regulate the same types of activities that are regulated under section 404 are taking advantage of the opportunity to participate in the joint processing Federal-State permit applications.

Iowa, Michigan, and Maryland are notable examples. I believe this opportunity to establish joint programs will encourage needed improvement in many States that have not yet adequately addressed environmental problems

caused by discharging dredged or fill material into the water environment.

To conclude my remarks, let me emphasize that the protection of water quality must encompass the protection of the interior wetlands and smaller streams.

In this regard, I should remind you that through the International Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter and our own Ocean Dumping Act of 1972, the United States has established both international and domestic programs to protect the oceans from uncontrolled discharges of sludges and dredged material.

The criteria for permitting the ocean dumping of dredged or fill material are, by design, consistent and very similar to those issued under section 404(b). Without an appropriate and effective program under section 404, only ocean dumping of dredged material will be closely regulated while many of our more productive and more limited inland water resources will be unprotected from both chemical and physical degradation.

The Department of the Interior has estimated that almost half of the wetlands which originally contributed to aquatic resources of our Nation have already been lost through draining, dredging, or filling.

Even with numerous programs aimed at their preservation, in excess of 25,000 acres of prime wetlands are lost each year. Our most productive aquatic systems have already been drastically reduced from their original 127 million acres to less than 80 million acres.

As you know, wetlands are a priceless, multiuse resource. They perform the following services:

One: High yield food source for aquatic animals;

Two: Spawning and nursery areas for commercial and sports fish;

Three: Natural treatment of waterborne and airborne pollutants;

Four: Recharge of ground water for water supply;

Five: Natural protection from floods and storms; and

Six: Essential nesting and wintering areas for waterfowl.

We should be mindful of the fact that when these areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

I must caution against expedient short-term considerations relating to the section 404 program, however compelling they may seem, in view of the long-term consequences associated with any such actions. What we do now affects not only the next decade but our next generation, and those that follow.

I mentioned at the beginning, Mr. Chairman, that there has been a lot of misinformation about this program. We believe the program has been managed in a way to avoid the kind of problems that you rightly are concerned about and that many members of the public are concerned about.

I am also concerned that misinformation and misguided advice has been put forward not on behalf of those frequently referred to, such as small farmers who we believe are totally excluded from the scope of these regulations, but by those

who wish to dredge and fill and develop wetlands to make a fast buck, if you will, at the expense of a long-term public interest.

I make that statement with full concern for the complexity of the problem. But I think that the wetland resource of this Nation is so vitally important to all of us that I would urge and beg this committee and the Congress to legislate in this area with the utmost care.

Again I commend the committee for conducting this hearing.

Senator RANDOLPH. Thank you very much, Administrator Train. If agreeable to the members of the committee, I would suggest that we have our four panelists give their presentation and then we go to the questioning.

Senator MUSKIE. Could I ask one question? I agree with that, Mr. Chairman. Could I ask one question simply to fill in on the history of the thing so it is clear?

Senator RANDOLPH. Yes.

Senator MUSKIE. The regulations which you have described, Mr. Train, are those issued a year ago this summer. What created the initial storm in section 404 was the policies that the Corps of Engineers announced in a press release issued after the court opinion; is that not so?

Mr. TRAIN. I believe that is correct. Mr. Veysey should answer that.

Senator MUSKIE. In other words, what created the initial storm of public opinion was a policy announced before you moved in, or somebody moved in, to redefine the policy in a more careful way you have described.

If the Corps had not, in other words, moved as it had with what I thought was distortion of legislative intent and created all of the reaction, you would not have had to move in as sort of the wet nurse to try to bring the storm under control.

That is the context in which your regulations were issued, as I recall. You may not, use the rhetoric that I just used, but isn't it a fact –

Mr. TRAIN. I think I will ask Mr. Veysey to respond to the question.

Senator MUSKIE. Isn't it a fact that the public relations problem which has brought all these people into this room at a late hour in the night, stirred up an issue by a release issued by the Corps of Engineers following the court opinion, before the careful definition of the regulations which you have described?

I wrote you a letter myself in that interim.

Mr. TRAIN. I remember practically the day that was issued. I was before another Senate committee on another matter. I was immediately confronted. In fact, I hadn't read the release at that time. And there was no question that the release contributed to a climate of public concern over the issue.

Senator MUSKIE. It didn't contribute; it created.

Mr. TRAIN. But I would say that the Corps of Engineers was by no means the only instrument for increasing public concern over the program.

Senator MUSKIE. I understand the Secretary of Agriculture participated.

Mr. TRAIN. Yes.

Senator MUSKIE. The Secretary of Agriculture, I think, cooperated very well with the Corps of Engineers. I just wanted to make that point because after your description, it sounded as though the problem had started with the regulations, where it actually started before.

If it had started with the regulations, conceivably there might not be a problem.

But the impression created by the release of the Army Engineers is still creating ripple effects in every State that is affected by the problem, and I suspect many of the refinements of your regulations have not yet caught up with those ripple effects to help abate the storm. That is my only point.

Mr. TRAIN. I must say I suspect that those who feel that their interests are threatened by 404 would have created a public storm over this issue, irrespective of any possible contribution from that press release.

Senator MUSKIE. We will make our independent judgments about that.

Mr. TRAIN. I wouldn't want to point a finger to the Congress on that. In any event, that is water over the dam.

Senator MUSKIE. Was the dam built with a permit?

Mr. TRAIN. I think with that I shall yield.

STATEMENT OF VICTOR VEYSEY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. VEYSEY. Mr. Chairman, if I might, I would like to respond in part to Senator Muskie's question, which I think is an appropriate one.

Since there is no part of that included in my testimony, I welcome the opportunity to insert it at this point. It is true, it is a sad fact, that sometime in the early hours on a long weekend when folks in the Corps of Engineers had been struggling with this problem, perhaps too long, a very misguided and very unfortunate press release was issued which said, if read very carefully, that under this law, many things might happen. That was before the regulations were written.

In a sense, it was true that a lot of things might happen, although there was no intent on the part of the Army Corps of Engineers or EPA to let any of those things happen. But the damage was done, as you point out so correctly. That stirred or perhaps struck a sympathetic note – I don't know which – but anyway, the release was issued from the Public Information Office of the Corps of Engineers. I guess we will never be permitted to forget that.

Senator MUSKIE. Neither will we.

Mr. VEYSEY. I regret very much that it did happen. After that time we took a rather firm grip on the situation.

I will say that with magnificent cooperation from Russ Train and all of his people at EPA, and the Interior and the Justice Depart-

* * *

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1974

THE ADMINISTRATOR

Dear General Gribble:

As you are undoubtedly aware, on March 13, 1974, the U.S. District Court for the Middle District of Florida issued a Memorandum Opinion in *United States v. Holland*. In that case, the United States sought to enjoin disposal without a permit of dredged material in wetlands which were above the mean high water line but were periodically inundated by tidal waters. The court held, *inter alia*, that wetlands above the mean high water line are subject to Federal jurisdiction under Section 404 of the Federal Water Pollution Control Act, as amended (the "FWPCA") and that discharges of dredged material into such areas "constituted discharges entering 'waters of the United States'."

The result reached in *U.S. v. Holland* is a jurisdictional milestone under the FWPCA. Wetlands above, and below, the mean high water line are of vital importance to our environment. The Corps has taken an admirably firm position to protect wetlands below the mean high water line. Recently issued Corps regulations stated that: "As environmentally vital areas, [wetlands] constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 CFR Section 209.120(g)(3). Our concern is that similar protections be provided for wetlands above the mean high water line.

We believe that the *Holland* decision provides a necessary step for the preservation of our limited wetland resources. Moreover, we are firmly convinced that the court properly interpreted the jurisdiction granted under the FWPCA and Congressional power to take such a grant.

Notwithstanding the decision in *U.S. v. Holland* and the recognized importance of wetlands to the environment, we have been informed that the Corps has declined to acquiesces in the *Holland* decision and has advised Corps installations not to accept applications for permits under FWPCA Section 404 for dredge and fill disposal in these areas. The Department of Justice has taken the position that it will not bring enforcement action against persons disposing of dredged or fill material to wetland areas without Section 404 permits so long as the Corps refuses to issue such permits. As a consequence, wetland areas above the mean high water line are presently unprotected from the irreparable damage caused by the disposal of dredged and fill materials.

So that this important and irreplaceable part of the environment will not go unregulated, I strongly urge the Corps of Engineers to reconsider its position and to commence processing Section 404 permits for wetlands above the mean high water line immediately. I would appreciate the opportunity to discuss this matter with you at your earliest convenience.

A separate but related matter also requires attention. On April 3, 1974, the Corps of Engineers promulgated final regulations with respect to Corps permits for various activities in navigable or ocean waters. 39 Federal Register 12115. Among other things, these regulations set forth certain procedures for the issuance of permits for the

disposal of dredged or fill material under Section 404 of the FWPCA.

Of particular concern to the Environmental Protection Agency is the definition of "navigable waters" set forth in these regulations, 33 CFR Section 209.120(d)(1). In proposed regulations published on May 10, 1973 (38 Federal Register 12217), the Corps proposed to define the term "navigable waters" to mean "waters of the United States, including the territorial sea," in accordance with the definition of "navigable waters" in the FWPCA. The final regulations promulgated on April 3, 1974, deleted the previous definition of "navigable waters" and substitutes therefor the following:

> "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 CFR 209.260 for a more complete definition of these terms)."

The preamble to the final regulation discusses the Corps' reasons for changing the definition and makes it clear that the term "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899 and the term "navigable waters" as defined in the FWPCA are to be "created synonymously." The preamble and the reference to the Corps' definitional regulation at 33 CFR 209.260 make it clear that the Corps intends to delineate FWPCA Section 404 jurisdiction on the basis of court decisions and Corps interpretations of "navigability." Our interpretation of "navigable waters" within the meaning of

the FWPCA does not conform to the Corps' recently issued regulation. We firmly believe that the Conferences Committee deleted "navigable" from the FWPCA definition of "navigable waters" in order to free pollution control from jurisdictional restrictions based on "navigability." Indeed, as the Conference Report states with respect to the modified definition of "navigable waters": "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. 92-1236, 92d Cong., 2d Sess. at 144. Perhaps a meeting of the appropriate personnel of the Corps and of EPA should be scheduled to resolve these discrepancies.

Sincerely yours,

/s/ John Quarles
Russell E. Train
Administrator

Lt. General W. C. Gribble, Jr.
Chief, Corps of Engineers
DAIN-ZA
Forrestal Building
Washington, D. C. 20314

Prepared by:
ASSW:JMcwardincd:5/4/74:50760:Rm.509

Consolidated Cases Nos. 04-1034 and 04-1384

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IN THE

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writs of Certiorari to The United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, NATIONAL ASSOCIATION OF REALTORS®, UTILITY WATER ACT GROUP, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
DAVID J. DEPIPPO
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

December 2, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Of Counsel:

JOHN R. STOLLER
FOUNDATION FOR ENVIRONMENTAL
AND ECONOMIC PROGRESS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 778-2229

RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611-4087
(312) 329-8200

MARK G. WEISSHAAR
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Utility Water Act Group

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

QUESTIONS PRESENTED

Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress's constitutional power to regulate commerce among the states?

Carabell v. U.S. Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress's authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTERESTS OF *AMICI CURIAE*

The Government's assertion that the term "waters of the United States," under the Clean Water Act (CWA or Act), extends to all geographic features that have a hydrological connection to navigable waters affects numerous activities undertaken by *Amici Curiae*. All parties have consented to the filing of this Brief.[1]

The Foundation for Environmental and Economic Progress (FEEP) is a national coalition of land-holding companies that advances balanced federal environmental law and policy affecting private land use. FEEP members own property throughout the Nation and must obtain CWA permits to manage and develop land.

The National Association of Realtors® (NAR) is a non-profit professional association of over 1.1 million members in the real estate industry. NAR's members' business activities are adversely affected by unwarranted limitations on the use of property, as are those of its members' clients and customers.

The Utility Water Act Group (UWAG) is an association of 205 electric utilities and four national trade associations of electric utilities: The Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the Nuclear Energy Institute. UWAG's members operate facilities that generate, transmit, and distribute over fifty percent of the Nation's electricity. UWAG members frequently obtain CWA permits to construct and maintain their generation facilities, transmission and distribution lines, and their associated families.

---

[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *amici* made a monetary contribution to its preparation.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

SUMMARY OF ARGUMENT

The plain language of the CWA expresses Congress's intent to regulate "navigable waters." The term "navigable waters" means "the waters of the United States, including the territorial seas." This Court has found the reach of the Act to be clear, and has approved an extension of jurisdiction beyond navigable waters only for wetlands that are inseparably bound up with and have a significant nexus to navigable waters. The Court based this limited extension on clear congressional intent to regulate such wetlands. Thus, the Act only reaches nonnavigable waters if they have a significant and inseparable bond with navigable waters. This bond must be important, consequential, and weighty; the connection with navigable waters must occur on a regular and ordinary basis.

The Government claims this Court's "significant nexus" test can be met by any hydrological connection through any type of conveyance, no matter how infrequent or attenuated. The Government's application of the any connection theory extends jurisdiction to distant, intrastate ditches, ephemeral desert drainages, underground pipes, and other areas even more remote than it reached under the debunked Migratory Bird Rule. Like the bird rule, the any connection theory carries the Government well into the traditional province of the States. Yet, the Act contains no clear statement, and there is no legislative history to suggest, that Congress authorized or intended this result. To the contrary, Congress chose to

"recognize, preserve and protect the primary responsibilities and rights of States" over land and water resources. Indeed, the agency regulations that were in effect the last time Congress considered the scope of the Act excluded such features from jurisdiction. Likewise, the current regulations that define "waters of the United States" exclude ditches and purport to regulate intermittent streams only under an "affecting commerce" rationale that is no longer viable. They do not mention ephemeral drainages at all. Nor do they suggest that "any connection" can be a basis of jurisdiction. Finally, it is not necessary to call every ditch or ephemeral drainage a water of the United States. The Act provides ample authority for the Government to regulate upgradient polluting *activities* that will impact navigable waters without federalizing the *locations* where the activities occur.

ARGUMENT

Although nominally about "adjacent wetlands," these cases are really about ditches. This is so because the Rapanos and Carabell wetlands may be deemed "waters of the United States" if and only if the ditches to which the Government claims the wetlands are adjacent are themselves waters of the Untied States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-25 (1985) (holding that wetlands adjacent to a navigable waterway are waters of the United States). In both *Rapanos* and *Carabell*, the lower court erred when, contrary to this Court's decisions in *SWANCC*[2] and *Riverside*, it determined that because the ditches at issue here had a hydrological connection, through miles of other ditches, intermittent creeks, and culverts, to navigable waters, the

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[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*).

ditches had a "significant nexus" with navigable waters, and therefore, CWA jurisdiction was proper.[3]

I. THE CWA REGULATES "NAVIGABLE WATERS" AND MAY REACH NONNAVIGABLE WATERS ONLY IF THE NONNAVIGABLE WATERS HAVE A "SIGNIFICANT" AND "INSEPARABLE" BOND WITH "NAVIGABLE WATERS."

Section 404(a) of the CWA regulates the "discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). Section 502 defines "navigable waters" to mean "waters of the United States, including the territorial seas." *Id.* § 1362(7). The Government has interpreted the term "waters of the United States" to include ditches and drains that have "a" hydrological connection to navigable waters. Yet, by its terms, the CWA does not grant jurisdiction over ditches and drains, nor does it grant jurisdiction over any water based solely on a hydrological connection to navigable waters.[4]

---

[3] *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 710 (6th Cir. 2004), *cert. granted* 126 S.Ct. 415 (2005) (CWA jurisdiction over non-navigable waters requires a significant nexus to navigable waters, "which can be satisfied by the presence of a hydrological connection"); *United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004), *cert. granted* 126 S.Ct. 414 (2005) (sites at issue "contained a hydrological connection to navigable waters and thus fell within the jurisdiction of the CWA").

[4] The Government attempts to gloss over this semantic inconvenience by referring to the ditches and drains as "tributaries." But tributaries are not in the statute either. In fact, the 1972 Conference Committee struck a reference to "tributaries" that had been included in the Senate's definition of "navigable waters." *See* S. 2770, 92d Cong. § 502(h) (1971), *reprinted in* 2 Cong. Research Serv., Legislative History of the Clean Water Act, at 1698 (1973). Moreover, the last time Congress considered the CWA, the Corps's regulations excluded ditches from jurisdiction and asserted jurisdiction over tributaries only to the headwaters, which would exclude many intermittent streams. *See infra* pp. 19-24.

This Court has considered the geographic reach of the CWA only twice. Most recently, it ruled that the U.S. Army Corps of Engineers (Corps) exceeded its authority by asserting jurisdiction over nonnavigable, isolated waters under the Migratory Bird Rule. *SWANCC*, 531 U.S. 159 (2001). Of critical importance to the Court's conclusion was that section 404(a) speaks of "navigable waters." *Id.* at 162. The Court found section 404(a) to be clear: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. This Court rejected the argument that "Congress' separate definitional use of the phrase 'waters of the United States' constitute[d] a basis for reading the term 'navigable waters' out of the statute."[5] *Id.* The Court acknowledged, however, that the phrase "waters of the United States" evinced a Congressional intent to reach "'at least some'" waters not traditionally navigable. *Id.* at 167 (quoting *Riverside*, 474 U.S. at 133).

Building on *Riverside* to give effect to the term "navigable," the *SWANCC* Court emphasized that there must be an "inseparable" relationship between nonnavigable and navigable waters to extend CWA jurisdiction to nonnavigable waters: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* (emphasis added). The Court stressed that its holding in *Riverside* was "based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *Id.* (citing

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[5] Responding to the Government's argument in *SWANCC* that the CWA's legislative history showed that Congress intended the term "'navigable waters' to be given the broadest constitutional interpretation," this Court found that nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3.

Riverside, 474 U.S. at 135-39). It found no similar legislative history or rulemaking to support jurisdiction over the ponds in *SWANCC*.

In short, *Riverside* and *SWANCC* establish that when the Government seeks to extend CWA jurisdiction beyond navigable waters, the Government must show that the nonnavigable waters and the navigable waters are "inseparable." *SWANCC*, 531 U.S. at 167; *Riverside*, 474 U.S. at 134.

A. "Significant Nexus" Means an Important and Regularly Recurring Relationship.

"A" connection cannot establish a "significant nexus." "Significant" means "full of import," "important," "weighty," and "consequential."[6] *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (the "commonly understood" meaning of significant is "important"). Significant does not mean "a" or "any." Courts have explicitly rejected attempts to equate "significant" with "any." *See Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that "significant risk" of HIV transmission does not mean "any risk" and "must be rooted in sound medical opinion and not be speculative or fanciful"); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched "occasionally" are not "significantly viewed" channels).

Environmental statutes and regulations take a similar view of "significant." When the Corps evaluates a permit application, it must prepare an environmental impact statement (EIS) if the permit will "significantly" affect the environment. 42

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[6] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2116 (1993) ("full of import," "IMPORTANT, WEIGHTY"); THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2860 (1993) ("Important," "consequential"); RANDOM HOUSE UNABRIDGED DICTIONARY 1779 (1993) ("important; of consequence").

U.S.C. § 4332(2)(C). The Corps's regulations make clear that a "significant" permit is the exception, not the rule. 33 C.F.R. § 230.7(a) ("Most permits will normally require only an [environmental assessment]," not an EIS.). Similarly, the CWA § 404(b)(1) Guidelines bar permit issuance if a project would result in "significant degradation." Significance is to be assessed based on the "*persistence and permanence* of the effects," not fleeting or potential effects. 40 C.F.R. § 230.10(c) (emphasis added).

The required significant, inseparable relationship between a navigable water and a nonnavigable one must also be regular and continuous, rather than occasional or infrequent. This is confirmed by the Corps's regulations, which limit jurisdiction over non-wetland waters to the "ordinary high water mark" (OHWM). 33 C.F.R. § 328.4(c)(1). Cases interpreting that term have consistently found that OHWM, and thus the reach of CWA jurisdiction, is measured during "ordinary" conditions, not occasional or extraordinary conditions.[7] The Government's "any connection" theory, on the other hand, allows jurisdiction based upon "a" connection, no matter how infrequent, irregular, or attenuated the relationship between the water-bodies. That theory, in turn, facilitates the regulation of ephemeral and intermittent drainages, including ditches that may have an "occasional," but not "ordinary," relationship with navigable waters. But under *Riverside* and *SWANCC*, a water that has only an infrequent or occasional relationship to navigable waters cannot be considered to have a

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[7] *Oklahoma v. Texas*, 260 U.S. 606, 632 (1923) (the river bed *does not* include the "lateral valleys [even though they are] . . . temporarily overflowed in exceptional instances when the river is at flood."); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991) (calculating ordinary high water line requires the exclusion of annual spring floods); *United States v. Harrell*, 926 F.2d 1036, 1042 (11th Cir. 1991) (the ordinary high water mark is "'the line to which high water ordinarily reaches'") (citations omitted).

significant nexus with navigable waters, even though it may have "a" connection under some extraordinary circumstances.[8]

B. The Fifth Circuit Properly Applied the Term "Navigable" and This Court's "Significant Nexus" Standard.

In contrast to the court below, the Fifth Circuit has faithfully applied the terms "navigable," "significant," and "inseparable." In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the court followed *Riverside* and *SWANCC* and rejected claims of jurisdiction over intermittent streams, *even though they had some connection to navigable waters:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself .... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water ....

Id. at 270-71. Further, in *In re Needham*, 354 F.3d 340 (5th Cir. 2003), the court considered and rejected the argument that the CWA "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at 345. The court declined to follow other courts that had accepted this theory because to do so "would push the [CWA] to the outer limits of the Commerce Clause and raise serious

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[8] Indeed, the most the Government can muster in *Carabell* is an "occasional" hydrological connection between the wetland and the adjacent ditch through "drainage cuts that run through the berm." Brief for the Respondents in Opposition [for a Petition of Certiorari], *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384 at 5, 10 (filed June 2005) (U.S. Carabell Cert. Opp.).

constitutional questions." *Id.* at 345 n.8. Reaffirming *Rice*, the *Needham* court stated that "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'"[9]

Thus, the Fifth Circuit appropriately required that for a nonnavigable water to be deemed a water of the United States, it must have a regular, "close, direct and proximate link" or relationship to navigable waters. "Any" connection is not enough. *Rice*, 250 F.3d at 272.

II. THE GOVERNMENT TRIES TO AVOID *SWANCC* BY CLAIMING THAT ITS REASONING IS IRRELEVANT TO "CONNECTED" WATERS AND THEN FINDING "CONNECTIONS" IN UNLIKELY PLACES.

The Government's response to *SWANCC* is to avoid it.[10] It says that *SWANCC* dealt solely with "nonnavigable, isolated, intrastate waters." It then claims that this Court's construction of the statute and the reasoning that led to its decision in *SWANCC* are inapplicable to any situation in which a nonnavigable water, be it a ditch or ephemeral drainage, has any hydrological connection to a navigable water.[11] This theory,

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[9] *Needham*, 354 F.3d at 345-46; *see also FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (a hydrological connection, by itself, is not enough to confer jurisdiction).

[10] *See, e.g.*, U.S. Carabell Cert. Opp. at 3, 6 n.2, 8, 11; Brief of the United States as Appellee at 40-47, *United States v. Johnson*, No. 05-1444 (1st Cir. filed Aug. 24, 2005); Brief of the United States, Appellee at 26-32, *United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002), *cert. denied* 538 U.S. 977 (2003) (No. 01-2746).

[11] This is wrong. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but

however, is based on specious reasoning which goes as follows:

- *SWANCC* held that an isolated water was not a water of the United States.
- Therefore, any water that is not isolated is a water of the United States.

The Government's reasoning sends courts and regulators on a fool's errand. No water is truly isolated.[12]

Moreover, that is not what this Court said. The *SWANCC* Court, informed by and explaining *Riverside*, found that nonnavigable waters must have a "significant nexus" to, and be "inseparably bound up with," navigable waters. 531 U.S. at 167-68 (citing *Riverside*, 474 U.S. at 134). But in the Government's hands, the "significant nexus" test is converted to a search for "any connection."[13]

Indeed, it is ironic that four years after this Court rejected the Corps's Migratory Bird Rule because, among other things, it would "result in a significant impingement of the States' traditional and primary power over land and water use," *id.* at 174, the Government has managed to use its "hydrological connection" theory to move even farther upgradient than it did under the bird rule. By now claiming all "connected" waters, such as ditches and ephemeral drainages, are "tributaries," the Corps has erected a skeleton of "connections"

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also those portions of the opinion necessary to that result by which we are bound.").

[12] As Justice Stevens pointed out in his dissent in *SWANCC*, for most waters, including the SWANCC ponds, it is possible to find a hydrological or ecological connection to navigable waters. *See* 531 U.S. at 176 n.2 (Stevens, J., dissenting); *see also infra* note 17.

[13] The Sixth Circuit followed the Government's chicanery: It said it was applying the significant nexus standard, but then allowed it to be "satisfied by the presence of a hydrological connection." *Carabell*, 391 F.3d at 710.

which then provide a basis to regulate any wetland "adjacent" to them.

In California's Central Valley, for example, prior to *SWANCC*, the Corps determined that two cattle waste ponds were waters of the United States because they were used by migratory birds. A nearby drainage ditch was deemed non-jurisdictional.[14] After *SWANCC*, the property owner sought a re-determination of jurisdiction over the ponds, only to be told that the ditch was now a tributary, and thus, the waste ponds remained jurisdictional, this time as "adjacent" wetlands.[15]

In the Corps's Jacksonville District Office, regulators have been instructed to "follow the drop of water."[16] Following the drop of water, however, is a limitless and tautological endeavor. All water is part of the hydrologic cycle, and, at some level, "connected."[17] Thus, in a case currently before the First Circuit, all that the Government needed to prove that a family cranberry farm "connects" to distant navigable waters was the deposition of its hydrologist that "[g]eographically speaking, the Sites are all located within the

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[14] Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 24, 2000) at App. 5a-6a; Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000) at App. 1a-4a.

[15] Letter from Michael Jewell, Chief, California/Nevada Section, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 13, 2001) at App. 7a-10a.

[16] *See* Presentation by John Hall, Chief, Regulatory Division, U.S. Army Corps of Eng'rs, Jacksonville Dist., *SWANCC Update and Aftermath* (Apr. 5, 2002) at App. 12a-13a.

[17] *See, e.g.*, U.S. Geological Survey, *The Water Cycle*, http://ga.water.usgs.gov/edu/watercycle.html; U.S. EPA Region 1, *The Water Cycle and Water Conservation* at A-2, http://www.epa.gov/region01/students/pdfs/ gndw_712.pdf ("In nature's water cycle, all things are connected.").

Weweantic watershed, and basic principles of hydrology indicate that water drains from the Sites until it reaches the Weweantic River and, eventually the Atlantic Ocean."[18] But, as EPA says, "[w]e all live in a watershed."[19]

A 2004 study by the General Accounting Office documents numerous instances in which Corps districts have used underground drain tiles, storm drain systems, and pipes to establish a hydrological connection to recapture jurisdiction over otherwise isolated features.[20] The Jacksonville District explicitly allows for connections "through mechanical means such as pumping."[21] Some districts limit the distance of such "connections," but the Chicago District recently issued guidance instructing its regulatory staff that "[t]here is no distance limitation."[22]

Ironically, in desert areas where there is seldom a drop of water to follow, and where the "marks" used to identify the

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[18] *See* Declaration of Scott Horsely ¶ 16 in support of United States's Memorandum in Support of its Motion for Summary Judgment on Liability, *United States v. Johnson*, No. 99-12465 (D. Mass. filed Feb. 19, 2004).

[19] U.S. EPA, *Watersheds*, http://www.epa.gov/owow/ watershed/; *see also* Physical Science: Concepts in Action at 704-08 (Pearson Prentice Hall 2004) (high school text book stating that "the Mississippi River watershed drains most of the central United States . . . from the Rocky Mountains in the west to the Appalachian Mountains in the east").

[20] General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* at 24-26 (Feb. 2004) (GAO Study), *available at* http://www.gpoaccess.gov/gaoreports.

[21] U.S. Army Corps of Eng'rs, Jacksonville Dist., *Approach on Identifying Adjacent Wetlands and Isolated Waters* (July 11, 2003) at App. 16a.

[22] Email from Mitchell Isoe, Chief, Regulatory Branch, U.S. Army Corps of Eng'rs, Chicago Dist., to U.S. Army Corps of Eng'rs, Chicago Dist., clarifying the Chicago District's Policy on CWA Jurisdictional Determinations (Feb. 9, 2005) at App. 18a.

"ordinary high water mark" on the barren desert landscape are often "remnants of a time when the water flowed along a different course,"[23] the Government applies its theory to the furthest extreme. Relying on such "marks" as evidence of "ordinary" water flow, the Corps regularly asserts jurisdiction over remote desert washes hundreds of miles from the nearest navigable water.[24] In Tucson, for example, the Corps determined that an ephemeral desert wash was a tributary to the Colorado River even though the wash terminated at a storm water detention basin hundreds of miles from the Colorado. The Corps determined that a "tributary connection" was established from the detention basin through a 6 inch diameter culvert. The culvert connected to a 1 foot wide channel, which connected to a concrete channel, which connected to a natural channel, which meandered through a residential neighborhood. Beyond that there was no channel, only paved surfaces. According to the Corps, however, "[t]hese road crossings act as conduits of the water and maintain the tributary connection" to three normally dry channels that finally connect to the Colorado River.[25]

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[23] GAO Study at 21.

[24] *See* U.S. Army Corps of Eng'rs, Los Angeles Dist., *Jurisdictional Determinations in Arizona*, *available at* http://www.spl.usace.army.mil/regulatory/jdocs/readx_jd_az.pl?order_by=filename&order=abc.

[25] U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Sunrise Office Park, File No. 2001-00379-RJD*, at 2-4 (Sept. 7, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AS%20SENT%20FinalSunriseOfficeParkAppealDecision.pdf; *see also* U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Turner Property, File No. 2000-00554-RJD*, at 2-6 (Apr. 2, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/Turner.pdf (upholding a similar determination that ephemeral desert washes are tributaries and relying on a January 19, 2001, legal memorandum issued by the Corps and EPA which stated that "[*SWANCC*] did not overrule the hold-

The tracing of sheet flow or rainfall over land or pavement to sustain a connection is not unique to the desert.[26] In Lancaster, New York, the Corps deemed an otherwise isolated wetland a "tributary" to another nearby wetland despite acknowledging that the only hydrological connection between the two was infrequent, low velocity sheet flow that exhibited no discernible channeling. The Corps then included another wetland because it was "clearly a part of the same ecosystem," and thus, "adjacent" to the first wetland, despite having no "discernible outlet for water flow and no evidence that water ever flows from [it]." The Corps found all of these wetlands to be "connected" through 6,500 feet of municipal storm sewer to a creek, and ultimately to Lake Erie.[27]

III. THE GOVERNMENT'S THEORY IMPINGES ON THE STATES' TRADITIONAL AUTHORITY OVER LAND AND WATER USE WITHOUT A CLEAR CONGRESSIONAL STATEMENT.

As shown in the preceding sections, the Government's hydrological connection theory sweeps into federal control features that are "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. To interpret the statute as conferring such broad authority raises serious constitutional questions. Where an agency interprets a statute in

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ing or rationale of [*Riverside*], which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each.").

[26] GAO Study at 18 (reporting that the San Francisco, Sacramento, and Los Angeles Districts base jurisdiction on "connect[tions] . . . through directional sheet flow during storm events").

[27] U.S. Army Corps of Eng'rs, Buffalo Dist., Admin. Appeal Decision, *NEC Transit/William, LLC, File No. 2000-00325(2)* at 2-4 (Aug. 30, 2001) *available at* http://www.lrd.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=1729&destination=ShowItem.

a manner that "invokes the outer limits of Congress's power" or "overrides . . . [the] usual constitutional balance of federal and state powers," this Court "expect[s] a clear indication that Congress intended that result." *Id.* at 172-74; *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). The clear statement rule[28] provides a judicial check on Congress's occasional inclination to legislate ambiguously so as to avoid the political consequences of tough policy choices. *See United States v. Lopez*, 514 U.S. 549, 574-79 (1995) (Kennedy, J., concurring).

The *SWANCC* Court made plain that there is no clear statement from Congress that it intended section 404(a) to reach features without a significant, inseparable nexus to navigable waters. 531 U.S. at 174. The Government does not even attempt to point to a statement of congressional authorization for its actions here. Therefore, this Court should, as it did in *SWANCC*, "read the statute . . . to avoid the significant constitutional and federalism questions raised" by the hydrological connection theory. *Id.*

The clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Transforming drainage ditches, ephemeral waters, and other remote waters into "navigable waters" undoubtedly intrudes on the local regulation of land and water use, and thus, triggers the clear statement requirement.[29]

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[28] The "most important" rule of statutory construction "is the clear statement rule." 1 Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-9 at 853 (3d ed. 2000).

[29] The regulation of land and water use within a State's borders is a traditional State function. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

Nothing can be more local than the control of drainage, and, correspondingly, local land use.[30] *United States v. Deaton* provides a telling example. 332 F.3d 698 (4th Cir. 2003), *cert. denied* 541 U.S. 972 (2004). There, the Fourth Circuit deferred to the Corps's determination that a drainage ditch in Parsonsburg, Maryland, was a federally regulable "tributary" because it "eventually flowed" through 8 miles of ditches, culverts, ponds, and dams to navigable waters. The ditch in question was, in fact, a 6-8 inch deep roadside swale, approximately two feet wide. It was maintained by the Wicomico County roads department to collect rainfall runoff from the road. It fed into other drainage ditches constructed and maintained by the Beaverdam Public Drainage Association (PDA). A PDA is an organization of local landowners certified by the county under Maryland law to establish and maintain drainage systems for agricultural production and the "public benefit."[31] There are more than 100 active PDAs on the Eastern Shore of Maryland managing the drainage of more than 180,000 acres of land. The Fourth Circuit's holding that the roadside ditch and the PDA ditches with which it connects are waters of the United States federalizes these local ditches. This imposition of plenary federal power certainly intrudes on local governments' ability to manage local drainage.

Not only are drainage ditches local, they are everywhere. The U.S. Department of Transportation requires that any federally funded primary road be "designed . . . and maintained to have adequate drainage, . . . cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). State and local govern-

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[30] *See generally New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905) (control of drainage is one of the most important police powers exercised by State and local authorities).

[31] MD. CODE ANN. Art. 25 §§ 52(a), 53 (2001). The Maryland legislature has declared that "such drainage shall be considered a public benefit and conducive to the public health, convenience, and welfare." *Id.* § 52(a).

ments impose similar requirements on the roads they fund. There are more than 3.9 million miles of roads in this country, which adds up to a lot of ditches and, under the Government's theory, a lot of navigable waters.[32] Nothing in the CWA indicates that Congress intended to reach so far.

Under our federal system, Congress may not effect such a result unless it clearly expresses its intent to alter the traditional balance between the federal and State governments. Here, Congress's intent is expressly to the contrary. Congress preserved the "federal-state balance" by "cho[osing] to 'recognize, preserve and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources'" within their borders. *SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)). Just as there is "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit," there is no clear statement that section 404(a) reaches nonnavigable ditches, erosional features, or intermittent streams that could "potentially" impact or "eventually flow" into navigable waters. *Id.* at 174.

The Government makes various arguments why its interpretation would not intrude upon the States' authority, all of which are unavailing. It says that "the only activity requiring a CWA permit is the discharge of a pollutant . . . . Other functions and activities relating to land use remain in the hands of local authorities." U.S. Carabell Cert. Opp. at 18; Brief for the United States in Opposition [for a Petition of Certiorari], *Rapanos v. United States*, No. 04-1034, at 24-25 (filed Apr. 2005) (U.S. Rapanos Cert. Opp.).[33] This ignores

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[32] *See* U.S. Dep't of Transp., Fed. Highway Admin., *Highway Statistics 2003 § V, Roadway Extent, Characteristics and Performance, Table HM-10, available at* http://www.fhwa.dot.gov/policy/ohim/hs03/ hm10.htm (last visited Nov. 28, 2005).

[33] The Government also argues that States can retain their power by seeking delegation of the CWA permitting program. Delegation does not

the fact that many activities inherent to land development constitute "discharges of pollutants," and downplays the consequences of being a "water of the United States." For such waters, among other things, water quality standards must be established and enforced, uses designated, and "total maximum daily loads" assigned. *See* 33 U.S.C. §§ 1313(a)-(d); 40 C.F.R. § 131.3(i). And when work needs to be done, for example, to maintain the carrying capacity of a roadside ditch, a permit must be obtained. Obtaining a CWA permit is costly and time consuming,[34] and the permit evaluation process draws the Corps into subjects far beyond the discharge of fill material that triggers the permit requirement.

For example, in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), the applicant sought a permit to impact 7.5 acres of ephemeral desert washes on a 608-acre development site near Phoenix, Arizona. Applicable regulations as interpreted by the Ninth Circuit, however, required the Corps to treat the entire 608-acre *private* project as a "federal action," thus triggering a host of other federal requirements. Similarly, the Corps's "public interest review" regulations draw it into a police-power-like assessment of "the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1).

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preserve the States' authority to control land and water use. It merely allows States to administer a *federal* program. *Carabell* is a perfect illustration of how little autonomy a State has when implementing a federal program. There, Michigan granted a permit, and EPA overruled the State. Finally, the Government argues there is no intrusion on State power when the Government is acting permissibly. This, however, is exactly the issue now before the Court.

[34] *See* David L. Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (Winter 2002) (finding that an average individual section 404 permit application costs $271,596 to prepare (not counting costs of mitigation, design changes, and carrying capital), and that it takes an average of 788 days to complete the permitting process).

If, based on considerations of "aesthetics," "land use," and no less than seventeen other factors, the Corps determines that a project would be "contrary to the public interest," it will deny the permit application.[35] The Corps's Jacksonville District recently relied on the public interest review to deny an application to fill 30 acres of agricultural ditches, which had the effect of halting a 4,573 acre development project. The Corps found that the project was "contrary to the overall public interest at this time" because it was "inconsistent" with plans for a project that the Corps itself was hoping to undertake, although the future Corps project had yet to be authorized by Congress.[36] This is a far, far cry from the water quality goals of the CWA.

IV. THE GOVERNMENT'S THEORY IS INCONSISTENT WITH PAST AND PRESENT REGULATORY TREATMENT OF DITCHES, INTERMITTENT STREAMS, AND EPHEMERAL DRAINAGES AND WARRANTS NO DEFERENCE.

The Government's boldest argument in support of its boundless "any connection" theory is that *Riverside* authorizes its treatment of ditches and intermittent streams as waters of the United States because *Riverside* upheld jurisdiction over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." U.S. Rapanos Cert. Opp. at 16 (citing *Riverside*, 474 U.S. at 135). Without support, this argument converts the Court's general contextual statement into a specific holding. The fundamental issue in *Riverside* was

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[35] This, notwithstanding this Court's observation in *Lopez* that the Constitution "withhold[s] from Congress a plenary police power." 514 U.S. at 566.

[36] U.S. Army Corps of Eng'rs, Jacksonville Dist., *Harmony Ranch Application Denial, available at* http://www.saj.usace.army.mil/pao/hotTopics/hot_topics_harmony.htm (last visited Nov. 26, 2005).

whether the Corps could treat "adjacent wetlands" as waters of the United States. The Court did not address which "other bodies of water" are waters of the United States, and it certainly did not consider, let alone hold, that distant ditches and intermittent streams are "navigable waters."

Moreover, the linchpin of the Court's decision in *Riverside* is starkly absent here. There, the Court deferred to the Corps's years-long rulemaking establishing the importance of adjacent wetlands to the water quality of navigable waters, and extensively documented Congress's consideration of, and express acquiescence to, the regulation of adjacent wetlands as waters of the United States during the debates on the 1977 CWA Amendments. Here, there is no rulemaking or legislative history to support the jurisdiction that the Government now claims. Indeed, had Congress in 1977, or this Court in 1985, considered the question of whether wetlands adjacent to ditches or drains are waters of the United States, the decisions would have gone the other way. At both times, ditches were expressly excluded from jurisdiction, intermittent streams were not regarded as tributaries, and ephemeral drainages were not even a glint in the administrative eye.

The Corps's first regulations implementing the CWA purported to regulate to the broadest constitutional extent of "navigable waters." 39 Fed. Reg. 12,115 (Apr. 3, 1974). The Corps's definition of "navigable waters" invoked the common understanding of that term as developed over more than a century of jurisprudence.[37] In 1975, responding to an unfavorable district court decision, the Corps adopted interim regulations expanding its jurisdiction beyond the broadest constitutional extent of navigable waters to reach the maximum extent of the Commerce Clause. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

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[37] In *SWANCC*, this Court stated that the Government "put forward no persuasive evidence that the [Corps's 1974 regulations] mistook Congress' intent." 531 U.S. at 168.

The 1975 regulations asserted jurisdiction over navigable waters and their non-navigable tributaries up to their headwaters—a cutoff point that *excluded* the upper reaches of waterways and other waters "hydrologically connected" to them. *See* 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975).[38] In 1977, the Corps adopted final regulations asserting jurisdiction over navigable waters, nonnavigable tributaries, and certain waters beyond the tributary system if their degradation could affect interstate commerce. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

With respect to the linear features at issue in this case, the Corps's 1975 regulations stated that "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters. 40 Fed. Reg. at 31,321. The Corps's 1977 regulations similarly disavowed jurisdiction over ditches, stating that

> nontidal drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the [CWA] including Section 208 and 402.[39]

A footnote to the 1977 regulations explained that the new definition "incorporates *all* other waters of the United States

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[38] The "headwaters" is the region upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. 40 Fed. Reg. at 31,325.

[39] The Corps's statement that ditches would be handled under other CWA programs, such as section 402, is consistent with the language of the CWA characterizing ditches as point sources. "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch . . . ." 33 U.S.C. § 1362(14). Because the CWA regulates the discharge of pollutants "*to* navigable waters *from* any point source," if a given a ditch is a point source, it cannot also be a "navigable water." *Id.* § 1362(12) (emphasis added).

that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce . . . ." 42 Fed. Reg. at 37,144 n.2 (emphasis added). That all-encompassing definition did not include ditches or ephemeral drainages. It did include "tributaries," but did not regard intermittent streams as tributaries, or even as part of the tributary system. Instead, intermittent streams were grouped with other waters that were "not part of the tributary system" and were only considered waters of the United States upon a showing that their "degradation or destruction could affect interstate commerce." 33 C.F.R. §§ 323(a)(3), (a)(5) (1978).

There is little evidence that Congress was even aware of the Corps's 1977 regulations, which came out only days before the passage of the 1977 CWA Amendments. Thus, the 1975 regulations were in effect the last time Congress considered CWA jurisdiction in 1977. Those regulations explicitly excluded ditches from jurisdiction, claimed jurisdiction over tributaries only to the headwaters, and made no claim or record whatsoever for jurisdiction over dry land features such as ephemeral drainages. Moreover, in 1977, the Corps continued to exclude ditches and only regulated intermittent streams if they could affect interstate commerce.

The Corps's treatment of those waters in 1975 and 1977 means that the Government cannot now argue that Congress, when it enacted the 1977 CWA amendments, "acquiesced" to the Corps's current treatment of "ditches" as tributaries,[40]

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[40] The Government may argue that the section 404(f) exemptions that mention ditches evidence an intent to treat ditches as waters of the United States. This argument was made and rejected in *SWANCC*. Congress's decision in section 404(f) to "exempt certain types of these discharges does not affect, much less address, the definition of 'navigable waters.'" *SWANCC*, 531 U.S. at 171 n.7; *see also, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (declining to "draw any inference [from section 404(f)] other than that Congress emphatically did not want the law to impede these bucolic pursuits.")

nor can it argue that *Riverside* upheld the regulation of ditches and intermittent streams as tributaries.[41]

Furthermore, nothing in the Corps's current regulatory definition of waters of the United States, adopted in 1986, suggests that "hydrological connection" can be the basis for jurisdiction. The regulations include tributaries, but do not define the term. Nor do they mention "hydrological connection." 33 C.F.R. § 328.3(a)(5). They exclude ditches,[42] treat intermittent streams separately from tributaries (as waters regulable if they "could affect interstate . . . commerce."), *id.* § 328.3(a)(3),[43] and do not mention ephemeral streams at all.

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[41] The Government may also try to point to section 404(g)(1) for congressional support, but, as this Court found in both *SWANCC* and *Riverside*, section "404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')." *SWANCC*, 531 U.S. at 171 (citing *Riverside* at 138 n.11). Moreover, the language in section 404(g)(1) hardly provides a clear statement of congressional intent to regulate all waters with a connection to navigable waters. Indeed, at the time section 404(g)(1) was enacted in 1977, jurisdiction in tributaries ended at the headwaters.

[42] *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (stating that "we generally do not consider [drainage and irrigation ditches excavated on dry land] to be Waters of the United States," but claiming the authority to identify certain ditches case-by-case as waters of the United States).

[43] The "could affect" commerce rationale has been questionable as a basis for CWA jurisdiction since *Lopez*, 514 U.S. at 559 (effects on interstate commerce must be "substantial"). *SWANCC*'s holding that the CWA is grounded in the channels power confirms that the rationale is no longer viable. 531 U.S. at 168 n.3. And, the Government has acknowledged as much. *See* 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003) ("in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over [the] isolated, non-navigable, intrastate waters" that are mentioned in that section); U.S. Carabell Cert. Opp. at 16 (claiming authority over distant ditches and intermittent streams now stems from the channels power).

Finding no congressional support for its actions, the Government will most likely argue that it is entitled to deference in interpreting the statute and its regulations. Where a statute is "clear"—as is the CWA's grounding in navigability—contrary agency interpretations do not warrant deference. *See SWANCC*, 531 U.S. at 172 ("We find § 404(a) to be clear"). Where a statute is ambiguous, non-arbitrary agency positions that are carefully considered and adopted through the rulemaking process merit deference. Less formal agency positions receive deference to the extent they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000). *Ad hoc* litigating positions are not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). The Corps's post-*SWANCC* hydrological connection theory is not the product of rulemaking, and it lacks any evidence of careful regulatory consideration. Indeed, the agencies themselves recognized the need for a rulemaking after *SWANCC* and began the process of instituting a "review [of] the regulations to ensure that they are consistent with the *SWANCC* decision."[44] But then abandoned it. In sum, the Government's current position, manufactured in recent litigation, is inconsistent with its earlier pronouncements regarding ditches, intermittent streams, and other non-navigable features, and finds no support in the current regulations. Accordingly, the Government is not owed any deference by this Court. *Id.*; *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

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[44] *See* 68 Fed. Reg. at 1993.

V. THE GOVERNMENT HAS AMPLE AUTHORITY TO REGULATE POLLUTING ACTIVITIES THAT WILL IMPACT NAVIGABLE WATERS WITHOUT DECLARING EVERY DITCH AND EPHEMERAL DRAINAGE A "WATER OF THE UNITED STATES."

Finally, the draconian and intrusive effect of the broad scope of CWA jurisdiction advanced by the Government, and approved by the court below, need not be tolerated in order to achieve the goals of the Act. The Government argues that it must treat all waters with any hydrological connection to navigable waters as "waters of the United States" because there is a "risk" that pollutants discharged to upgradient ditches will migrate downstream and ultimately degrade a navigable water.[45] Citing a statement in the legislative history that "'[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source,'"[46] the Government claims that to "control the discharge of pollutants at the source," it must treat the "source"—in these cases, ditches and intermittent streams—as "waters of the United States."

This is wrong on the law and the facts. The Act provides ample means to regulate upgradient polluting *activities* that will impact navigable waters. Indeed, the 1972 CWA Amendments effected a sea change in the law precisely to provide

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[45] *See* U.S. Rapanos Cert. Opp. at 13. The CWA does not regulate risks to "navigable waters"; it regulates actual discharges. Without an actual discharge, there is no jurisdiction. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 505 (2d Cir. 2005).

[46] *See, e.g.*, Brief of the United States, Appellee at 22-23, *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (No. 04-3941) (quoting S. REP. NO. 92-414 at 77 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742); *see also* U.S. Rapanos Cert. Opp. at 10.

that authority.[47] The prior law had focused on establishing water quality standards for navigable waters. The 1972 Act shifted to preventing the discharge of pollutants in the first place. Thus, now the Act prohibits the "discharge of any pollutant," which is defined as "any addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. §§ 1311(a), 1362(12). The Act has two permitting programs to regulate the discharge of pollutants. *Id.* §§ 1342, 1344. Section 402 (the National Pollutant Discharge Elimination System (NPDES)) regulates the disposal of waste materials in soluble effluent, typically from industrial and municipal sources.[48] Section 404 regulates the placement of dredged and fill material, and is generally associated with construction activities. Section 402 effluent wastes are generally disposed through "point sources," such as pipes and/or ditches, and flow to a navigable water. Section 404 fill, by contrast, generally does not migrate anywhere, but instead "fills" the area into which it is placed, usually creating a stable foundation for construction activities.

These two regulatory programs, taken together, establish broad federal power to regulate pollutant discharging *activities* at their source. EPA has long claimed, and courts have allowed, broad authority to regulate the discharging activity, wherever it occurs, when the discharged pollutants migrate to navigable waters. Thus, the *activity* is regulated without calling the *location* at which the activity takes place, or any intermediate conveyance, a water of the United States.

An early EPA General Counsel Opinion explains EPA's view that "the basic triggering mechanism [for the Act's per-

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[47] *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976) (discussing the drastic change in method of CWA regulation from water quality standards to point source control).

[48] *See id.* at 204; *Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1304 (D.D.C. 1982) (NPDES program is the "heart" of the Act).

mitting requirements] . . . is the release of pollutants from some form of conveyance or container into navigable waters."[49] Once triggered, the permit requirements apply directly to the pollutant's source, but the source does not become a water of the United States.[50] EPA confirmed this interpretation by defining "discharge of pollutants" to include a release to a conveyance that eventually reaches navigable waters. EPA explained that

> a discharge to a pipe is not, *in and of itself*, a discharge of pollutants subject to the permit program. A discharge to a pipe must ultimately reach navigable waters in order to fall within the purview of the NPDES requirements.[51]

By the same token, EPA treats pollutant discharges to municipal separate storm sewer systems (MS4s) as discharges *through* MS4s to navigable waters. It does not regard the sewer system itself as a water of the United States. Thus, the government is able to regulate the polluting *activity* without

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[49] *In re Friendswood Dev. Co.*, 1976 WL 25237, at *2 (EPA Gen. Counsel Op. June 11, 1976).

[50] *Id.* at *4 ("Friendswood's customers create pollutants—they should therefore be directly responsible for their proper disposition."). Of course, an episodic link to navigable waters via the "discharge of a pollutant" does not mean a nonnavigable water has an inseparable and significant relationship with navigable waters, and thus, becomes a water of the United States. A nonnavigable water may become a water of the United States only if the waterbody itself has a significant and regular relationship with a navigable water. *See supra* pp. 4-8.

[51] 44 Fed. Reg. 32,854, 32,857 (June 7, 1979) (emphasis added). "This definition includes additions of pollutants into waters of the United States from . . . discharges through . . . other conveyances owned by . . . other person[s] which do not lead to a treatment works; and discharges through . . . other conveyances, leading into privately owned treatment works." 40 C.F.R. § 122.2.

transforming the *location* of that activity into a water of the United States.[52]

Case law supports EPA's long-held position that it has ample authority to regulate pollutants at their source without calling intervening conveyances waters of the United States. *See, e.g., United States v. Ortiz*, 2005 U.S. App. LEXIS 23559 (10th Cir. Nov. 1, 2005) (affirming a conviction for flushing chemical waste down a toilet that led to a sewer system that discharged into the Colorado River without calling the sewer system or the plumbing "waters of the United States"); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (requiring an NPDES permit for discharges of liquid manure that traveled over a swale, through a pipe, and in a ditch, and ultimately to waters of the United States with-out calling the ground, pipe, or ditch "waters of the United States").

The Fifth Circuit's decision in *Needham* illustrates the point. There, oil was discharged from defendant's well into an upland drainage ditch and migrated through two nonnavigable bayous to a navigable water. The court held the defendant liable because the oil reached a nonnavigable bayou that was "adjacent to an open body of navigable water, namely the Company Canal." 354 F.3d at 346. Notably, the court explicitly rejected the Government's "any hydrological connection" argument, and refused to treat the ditch and the intervening bayous as waters of the United States. *Id.* at 345. But the Government was nonetheless able to reach the discharge of pollutants at the source.

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[52] 40 C.F.R. § 122.26(a)(4); 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990). The Act and EPA similarly regulate discharges to publicly owned treatment works (POTWs) as pass-through discharges without calling POTWs waters of the United States. *See United States v. Hartsell*, 127 F.3d 343, 348 (4th Cir. 1997) (finding liability for discharge through sewer system without holding that sewer system is waters of the United States); 40 C.F.R. pt. 403.

The Act, case law, and EPA's previous positions belie the Government's present claim that it must treat ditches as waters of the United States because "pollutant discharges into wetlands and their adjacent tributaries will ultimately impair the quality of traditional navigable waters." U.S. Rapanos Cert. Opp. at 13. This claim rings particularly hollow in the context of a section 404 activity. Fill material does not migrate.[53] The Government has ample authority to regulate polluting activities without federalizing the locations where the activities occur, or any intermediate conveyances between the activity and the "navigable waters."

CONCLUSION

For all of the foregoing reasons, the decisions of the Court of Appeals in *Rapanos* and *Carabell* should be reversed.

Respectfully submitted,

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
DAVID J. DEPIPPO
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

December 2, 2005

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[53] Robert J. Pierce, Wetland Science Applications, Inc., *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act*, 36, 40 (April 2003), Docket No. EPA-HQ-OW-2002-0050-1835, *available at* http://www.regulations.gov/fdms public-rel11/component/main.

Of Counsel:

JOHN R. STOLLER
FOUNDATION FOR ENVIRONMENTAL
AND ECONOMIC PROGRESS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 778-2229

RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611-4087
(312) 329-8200

MARK G. WEISSHAAR
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Utility Water Act Group

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

APPENDIX

GIBSON & SKORDAL
Wetland Consultants
2277 Fair Oaks Blvd., Suite 395
Sacramento, California 95825
(916) 569-1830
Fax: (916) 569-1835

August 17, 2000

Mr. Justin Cutler
Army Corps of Engineers
Regulatory Branch
1325 J Street
Sacramento, California 95814

Subject: Revised Wetland Delineation Report - Franklin Meadows, Sacramento County, California

Dear Mr. Cutler:

This letter presents the results of a jurisdictional delineation and subsequent revisions for the approximately 261-acre study area located immediately east of Franklin Boulevard and ½ mile south of Elk Grove Boulevard in Section 4, Township 6 North, and Range 5 East of Sacramento County, California (Latitude 38° 23' West, Longitude 121° 26' North). The attached Figure 1 is a vicinity map.

Field studies were conducted on October 27, 1999 and August 15, 2000 for the purpose of identifying all potential jurisdictional waters including wetlands within the study area. Wetlands were mapped in the field onto a 1"=200' topographical map. Area of jurisdictional wetlands was determined by field measurements.

The **"Corps of Engineers Wetlands Delineation Manual"**[1] was used as the standard for determining whether specific areas are wetlands subject to regulation under Section 404 of the Clean Water Act. Corps of Engineers' regulations (33 CFR 328) were used to determine the presence of waters of the United States other than wetlands. The **"National List of Plant Species That Occur In Wetlands: California (Region 0)"**[2] was used to determine the wetland indicator status of observed plant species. The **"Soil Survey of Sacramento County, California"**[3] was used to evaluate soil mapping for the study area.

The study area consists of leveled, irrigated pasture land which has been used for dairy farming and crop production in the past. A few abandoned barns, out-structures, and excavated dairy waste sumps still remain from the old dairy operation. Numerous irrigation ditches bisect the study area. Mapped soils types include San Joaquin silt loam, leveled, 0 to 1 percent slopes; and San Joaquin-Galt complex, leveled, 0 to 1 percent slopes. A majority of the study area is mapped as San Joaquin-Galt complex which are generally described as moderately well drained soils that have been cut and leveled and/or filled. The mapped soils are not considered to be hydric but they do have hydric inclusions in basins and depressions.

Habitat in the study area consists almost entirely of open annual grassland characterized by soft chess (*Bromus mollis*), tarweed

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[1] Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station. Vicksburg, Miss.

[2] Reed, P.B. 1988. National List of Plant Species That Occur in Wetlands: California (Region 0). Biological report 88(26.10). May 1988. National Ecology Research Center, National Wetlands Inventory, U.S. Fish & Wildlife Service, St. Petersburg, Florida.

[3] USDA, Soil Conservation Service. 1991. Soil Survey of Sacramento County, California.

(*Holocarpha virgata*), yellow star-thistle (*Centaurea sostitialis*), and Mediterranean rye (Hordeum hystrix). Other common species include perennial rye (*Lolium perenne*), prickly lettuce (*Lactuca serriola*), English plantain (*Plantago lanceolata*), curly dock (*Rumex crispus*), and chicory (*Cichorium intybus*). Attached is a partial list of plant species observed in the study area including their wetland indicator status.

Jurisdictional waters identified in the study area include approximately 0.09 acre of seasonal wetlands including SW1 (900 sq. ft.), SW2 (840 sq. ft), SW3 (850 sq. ft.) and SW4 (1,250 sq. ft.). Also, as identified by the Corps of Engineers during field verification, two abandoned dairy waste sumps totaling 0.98 acre have been determined to be jurisdictional waters. The attached delineation map shows the location and size of jurisdictional wetlands. Also attached are data sheets for representative data points taken during the field investigation.

All of the seasonal wetlands occur within shallow depressions located at or adjacent to the toe of road berms which flank irrigation ditches. Typically these areas pond surface water for long duration during the winter and early spring, but they tend to dry up by late spring in most years. Wetland hydrology indicators observed in the field include location within a defined depression overlaying tight clay soils, algae matting, oxidized root channels on live roots, and deep hoof marks left by cattle.

Typical soils in the seasonal wetlands are very dark grayish brown (10YR 3/2) clay loams with mottles at depths of 1 to 6 inches. Some of the wetland areas lacked obvious hydric soil color indicators by they showed clear evidence of aquic moisture regimes. In these areas, hydric soils were assumed present based on the presence of an aquic moisture regime. Vegetation in the seasonal wetlands is dominated by annual rabbit-foot grass (*Polypogon monspeliensis*) and Mediterranean barley (*Hordeum hystrix*). Common associates in-

clude mannagrass (*Glyceria sp.*), slender popcorn flower (*Plagiobothyrs stipitatus*), perennial rye, curly dock, clustered dock (*Rumex conglomeratus*), and postrate knotweed (*Polygonum aviculare*).

The two abandoned dairy sumps (0.98 acre) contain open water and wetland vegetation. Approximately 90 percent of S1 was ponded in mid-August with a wetland fringe dominated by swamp timothy (*Crypsis schoenoides*), barnyard grass (*Echinochloa crusgalli*), and knotgrass (*Paspalum distichum).* Approximately 30 percent of S2 was ponded in mid-August. Wetland vegetation is dominated by swamp timothy and smartweed (*Polygonum sp.*). The adjacent upland is dominated by soft chess and yellow star thistle.

A number of irrigation ditches associated with past farming and dairy operations occur within the study area. The ditches were initially constructed in uplands for purpose of irrigation, and as such, they are not jurisdictional waters subject to regulation by the Corps.

In summary, we identified a total of 1.07 acres of jurisdictional waters including four seasonal wetlands and two abandoned dairy sumps as shown on the attached delineation map. If you have any questions concerning this report or need additional information, please contact me at (916) 569-1830.

Sincerely,

James C. Gibson
Principal

JCG:bjs
w/Attachments

cc: Mr. Craig Naglar
Dunmore Homes
2150 Professional Drive, Suite 150
Roseville, California 95661

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

August 24, 2000

Regulatory Branch (199900653)

James Gibson
Gibson & Skordal
2277 Fair Oaks Blvd., Suite 395
Sacramento, California 95825-5500

Dear Mr. Gibson:

This letter concerns the delineation of waters of the United States, including wetlands, you have provided on behalf of Dunmore Homes for the Franklin Meadows project. This property is located in Section 4, Township 6 North, Range 5 East, Sacramento County, California.

I have reviewed and verified your **August 17, 2000, Revised Wetland Delineation Report—Franklin Meadows, Sacramento County, California** document and drawing showing approximately 1.07 acres of waters of the United States, including wetlands, within the surveyed area. Our jurisdiction in this area is under Section 404 of the Clean Water Act based on the definition of waters of the United States, as defined in 33 CFR 328. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States. Accordingly, a permit will be required prior to filling any of the waters present on the property. The type of permit required will depend on the type and amount of waters which would be lost or adversely modified by fill activities.

This verification is valid for five years from the date of this letter unless new information warrants revision of the deter-

mination before the expiration date. Please refer to identification 199900653 in any correspondence concerning this project. If you have any questions, write to Mr. Justin Cutler, Room 1480 at the letterhead address, or telephone (916) 557-5258.

Sincerely,

Justin Cutler
Project Manager, Delta Office

Enclosure

Copies Furnished (w/o enclosures)

Craig Nagler, Dunmore Homes, 2150 Professional Drive, Suite 150, Roseville, California 95661-3760

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

August 13, 2001

Regulatory Branch (199900653)

James Gibson
Gibson & Skordal
2277 Fair Oaks Blvd., Suite 395
Sacramento, California 95825-5500

Dear Mr. Gibson:

This letter concerns your request, submitted on behalf of Dunmore Homes, to review the verified August 17, 2000, wetland delineation for the Franklin Meadows property. This property is located in Section 4, Township 6 North, Range 5 East, in Sacramento County, California.

As a result of your request and because of recent court decisions, we conducted a through review of the jurisdictional issues for the subject property. As you are aware, ditches excavated in uplands are usually not considered waters of the United States. However, drainage ditches which were constructed in re-routed or channelized naturally occurring tributary streams generally are waters of the United States, even if they were excavated in upland areas or prior converted cropland. Among other documentation, including information you provided, we reviewed historical aerial photographs and topographical maps of the property. This information indicates progressive re-routing and channelization of tributary waters on the property. As such, we have determined that a portion of the existing drainage ditch is considered a waters of the United States, and tributary to Stone Lake (See enclosed map).

Furthermore, we have reviewed your assertion that the two ponds, identified as S1 and S2 in **your August 17, 2000, Request for Verification of Revised Delineation - Franklin Meadows Project, Sacramento County, California**, are isolated and not subject to jurisdiction. Based on the information, we cannot concur with this assertion. The subject ponds are abandoned, meet all three wetland criteria, and are adjacent to waters of the United States. Therefore, the ponds are considered waters of the United States.

In light of the above determinations, our August 24, 2000, wetland verification letter for this property is no longer valid. A revised wetland delineation map, which includes a portion of the drainage ditch and wetlands subject to our jurisdiction should be submitted to this office for final verification.

We appreciate your cooperation in this matter. Please refer to identification number 199900653 in any correspondence concerning this project. If you have any questions, please write Mr. Justin Cutler, Room 1480 at the letterhead address, e-mail: jcutler@spk.usace.army.mil, or telephone (916) 557-5258.

Sincerely,

Michael S. Jewell
Chief, California/Nevada Section

Enclosure

Copies Furnished w/Enclosure:

Craig Nagler, Dunmore Homes, 2150 Professional Drive, Suite 150, Roseville, California 95661-3760

Kent McDermitt, The McDermitt Co., 735 Sunrise Ave., Suite 155, Roseville, California 95661-4532

CESPK-CO-R 13 Aug 2001

MEMORANDUM FOR RECORD

SUBJECT: Jurisdictional Determination for Franklin Meadows Property (Regulatory Branch Number 199900653)

1. A request to review the subject property's verified August 17, 2000, *Revised Wetland Delineation Report - Franklin Meadows, Sacramento County, California*, was received by the applicant's agent on March 22, 2001. The applicant's agent specifically requested that we review the jurisdictional status of two seasonal wetlands identified as SW1 and SW2 in the above mentioned delineation document. On July 12, 2001, the agent requested we withhold making any decisions until we had been provided additional information. The following information is a summary of the findings and conclusions.

2. Historical photographs, topographical maps, and other documentation for the area were reviewed. In particular the following referenced data were used to support our determination:

a. February 18, 2000, aerial
b. May 22, 1989, aerial
c. March 24, 1973, aerial
d. August 17, 1937, aerial
e. 1909 U.S. Geological Survey Topographic map.

3. Pursuant to the *January 17, 1991, Questions and Answers Regarding RGL 90-7*, ". . . drainage ditches which were constructed in re-routed or channelized naturally occurring tributary streams generally are waters of the U.S. even if they were excavated in upland areas or prior converted cropland." Interpretation of reference (d) and (e) indicate the presence of a tributary to Stone Lake in the early 1900's, which crossed the property. The references listed indicate the progressive re-routing and channelization of previously existing natural

tributaries. Reference (a) shows sufficient drainage of water from the property through the existing culvert under Franklin Blvd. and into the natural tributary east of Franklin Blvd., which is a tributary to Stone Lake. Based on this information, we have determined that a portion of the ditch is considered a tributary waters of the United States. The beginning point of this tributary has been drawn by extrapolating reference (e)'s 20 foot contour line to a point on the existing drainage. We believe this is a reasonable point at which naturally occurring tributary waters existed (See attached map).

4. As such, the two seasonal wetlands in question are considered wetlands, which meet all three wetland criteria, and area adjacent to waters of the United States. Furthermore, a hydrologic analysis provided in the agent's June 26, 2001, letter specifically describes these seasonal wetlands as overflowing during a 10-year annual rainfall scenario.

US ARMY CORPS
OF ENGINEERS
Jacksonville District

SWANCC Update and Aftermath

John R. Hall
Chief, Regulatory Division

12a

Jurisdictional Determinations

- Corps is spending more time looking for
  - > Tributary connections
  - > Adjacency of wetlands
  - > Evidence of navigable use or potential navigable use of the open water areas

- Done by all offices spread across entire State.
  - > HQ promises guidance is coming
  - > Difficult ones reviewed by Jacksonville Office.

- Practicable application: follow the drop of water.
- Key Terms.
  - > Contiguous: Those wetlands which are physically connected to navigable waters
  - > Adjacent: Those wetlands which are near tributaries to navigable waters but are not physically connected.
  - > Isolated: Those wetlands whereby the waters could not reach navigable waters via surface flow or are not in close physical proximity to other waters of the United States.

DEPARTMENT OF THE ARMY
Jacksonville District Corps of Engineers
P.O. Box 4970
Jacksonville, Florida 32232-0019

Jacksonville District Approach on Identifying Adjacent Wetlands and Isolated Waters

July 11, 2003

This paper consolidates and restates the longstanding approach of the Jacksonville District on identifying adjacent wetlands and isolated waters under the Corps Clean Water Act Regulatory Program. Although the District has generally provided this guidance informally to staff in the past, because of the current size of the District and the scrutiny on the Corps determinations of waters of the US after the SWANCC Supreme Court Decision, it is necessary to provide a written statement of the District's longstanding approach. This paper does not establish new policy guidance on waters of the US.

The Supreme Court's decision in the SWANCC cases raised several issues that will be interpreted by Corps of Engineers rulemaking with EPA. In the interim, Districts have been directed to use the approach that they did prior to the "migratory bird rule" to make determinations of tributary systems, adjacent wetlands and isolated waters.

Adjacent Wetlands: Under the Corps Regulation, the term adjacent wetlands means *"bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent" wetlands.* (33CFR328.3 (c)). This District has viewed adjacent wetlands to have two components, a physical component and a hydrologic connection component. The Corps definition talks in terms of "narrow" non-water of the US features, such as river berms, man made barriers and the like.

As a rule of thumb, if a wetland is within 200 feet of open waters (defined in this context and used in this document as any flowing or standing surface water, even though the water may not be present for the entire year) of another water of the US (wetlands can not be adjacent to other wetlands, such as wetlands that are contigous to open waters that are a tributary) then the wetland area is considered adjacent to that open water of another water of the US.

As provided in Corps regulations, wetlands cannot be adjacent to the other wetlands, they must be adjacent to open waters of another water of the US. Open waters clearly include areas below the OHWM of any open water area such as a lake, pond or stream. Most "sloughs" and other headwater systems in Florida have "open waters" including very small channels that have evidence of an OHWM. The water does not have to be present or flowing year round, just the extent that an OHWM is established.

Tributary: The concept of tributary is critical to determining whether an area is a water of the US. If there is any tributary with open waters, no matter how small, then wetlands may be "adjacent" to those open waters of the tributary. Any surface water connection that has a defined OHWM or is part of a continuum of wetlands, whether natural or man-made, is a tributary connection. This approach was used prior to the migratory bird rule" and subsequent to it was clarified and included in the preambles to the Nationwide permits reauthorizations (See Corps 2000 preamble to its Nationwide permits at Federal Register Vol. 65, No. 47, March 9, 2000, pages 12823 to 121824 and Corps 1991 preamble to its Nationwide permits at Federal Register Vol. 56, No. 226, November 2, 1991, pages 59112 to 59113). Under the District's traditional approach as clarified in the guidance in the Corps Nationwide permits preamble, a large portion of the canals, and drainage ditches in Florida are tributaries, because they re-route former natural flows that previously occurred

through a slough system, or sheetflow across the landscape, that canal or ditch has replaced the former water flow and becomes a tributary water of the US. The canal or ditch carries water and pollutants from upstream to downstream areas. Moreover, where a canal or ditch has connected a formerly isolated wetland and other waters of the US, and the canal or ditch, has an OHWM or is part of a continuum of wetlands, then that canal or ditch, as well as the upstream wetland, becomes a tributary water of the US. Culverts under roads and other upland features, weirs, drop structures and other structures do not eliminate the tributary connection, provided there is some conveyance of the water from upstream to downstream, (even through mechanical means such as pumping for example). Similarly, some tributaries convey water from upstream to downstream in natural underground flow-ways such as in karst formations. Where a substantial amount of the water is determined by the Corps to flow regularly under normal conditions through such underground areas, the tributary connection is maintained, since pollutants flow directly from upstream to downstream areas.

Tributaries routed through treatment systems: In some situations in the Jacksonville District, tributaries have been routed through waste treatment systems (including storm-water management ponds). Our position is that although the waste treatment system itself is not jurisdictional, the conveyance from upstream to downstream is maintained and the jurisdictional connection to all of the upstream wetlands remains intact. Any party wanting to eliminate the tributary conveyance by filling the treatment pond for example, would also sever jurisdiction to all waters upstream of the filling. Those waters upstream of the filling would now be isolated. Therefore, the entity performing the filling would be required to either re-route the conveyance through some means such as a ditch, culvert, pipe, etc., or mitigate for all upstream losses of jurisdictional waters.

Isolated Waters: Wetlands or other waters that are surrounded by uplands and are not either adjacent or tributary as described above are isolated waters. This includes wetlands that directly communicate with ground water but do not have a "substantial" downstream flow to other waters of the US. Isolated waters that have no connection to interstate commerce other than use of the water or wetland by migratory birds are not waters of the US. The District has in the past used navigable use of an isolated water as a connection to interstate commerce, and that interstate commerce connection is still valid. For example, if a pond, lake, or stream is physically isolated (no tributary connection to downstream waters) but has a public boat access, even for small watercraft, such as canoes or kayaks, that water remains a water of the US, because of the potential use by interstate travelers. Public boat ramps and other public boat access are very strong evidence of navigability on otherwise isolated lakes and ponds. However, there may be instances where a dedicated public access point is non-existent, but one or many "in fact" public access points are able to be utilized. All around this District, many people launch canoes and small boats at bridge crossings in state and local DOT RsOW. The basic assumption here is that one must have some way to reasonably access the water body without unlawfully trespassing on privately held property. Trespass on publicly owned property may still be an unresolved issue but given the decades old practice of allowing it in this District, it appears to be a legitimate way of accessing some waters.

-----Original Message-----
From: Isoe, Mitchell A LRC
[mailto:Mitchell.A.Isoe@lrc02.usace.army.mil
Sent: Thursday, February 10, 2005 8:57 AM
Subject: Chicago District Regulatory Program Bulletin U.S. Army Corps of Engineers Chicago District Regulatory Branch

February 9, 2005

This communication is intended to provide you with current information on our Regulatory Program.

Jurisdictional Determinations

1. Underground Connections: Consistent with federal case law, the District wishes to clarify that underground connections can serve as sufficient hydrologic connections for a body of water to be considered a tributary to a "waters of the United States," and thus subject to the Clean Water Act jurisdiction of the U.S. Army Corps of Engineers.

The following is provided for clarification:

The District may assert jurisdiction over piped conveyances even if there is no evidence of a historical connection. The presence or absence of a "historical" or "natural" connection. is not determinative of whether or not a body of water is jurisdictional. The piped hydrologic connection must be present and verified. A dye test, tile survey, engineering plans, or other appropriate means could be used to confirm the presence of the connection. The connection must be discrete and easily traceable. There is no distance limitation.

2. Final Jurisdictional Determinations: Once the District completes a final jurisdictional determination, the District will not make a re-determination unless the District based its determination on incorrect information. On a case-by-case basis, the District may make re-determinations, only upon a

finding that the original determination was made based on incorrect information or material omissions.

3. Requests for Jurisdictional Determinations: Only a landowner can request a final jurisdictional determination. Non-owners can request a jurisdictional determination but it will be rendered as preliminary, and subject to change. Only the landowner can authorize Regulatory Branch staff legal access to a property that is typically required for a final determination.

Mitchell A. Isoe
Chief, Regulatory Branch

MOTION FILED

DEC 1 - 2005

(39) (50)

No. 04-1384 04-1034

In the
Supreme Court of the
United States

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER;
FRANCES GORDENKER,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

For a Merits Brief
On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF DONALD L. HARKINS, CONCERNED MICHIGAN PROPERTY OWNER IN SUPPORT OF THE PETITIONERS

WILLIAM J. REISDORF (P28570)
189 E. Big Beaver Road, #205
Troy, MI 48083
(248) 689-6996

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the rules of this Court, Donald L. Harkins moves for leave to file the accompanying merits brief in support of the petitioner. Due to the last minute filing of this brief, neither the petitioner nor the respondent has consented to the filing of this brief although both parties are receiving copies of this filing at the same time as the Court.

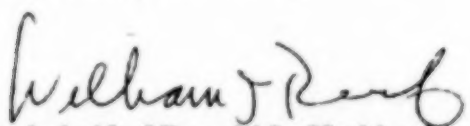
The issue presented is whether or not the Army Corp of Engineers have jurisdiction over Petitioners' property under the Clean Water Act. Harkins' interest in this case is purely in the interest of justice in that he believes that both the trial court and the appellate courts have allowed the Army Corp of Engineers (herein Corps) to redefine the term "waters of the United States" in an unlawful matter which would expand the Corp's jurisdiction under the Clean Water Act to include almost all "public lands of the United States".

Under Rule 37.1 of the rules of this Court, This Honorable Court should favor the filing of the accompanying brief since it brings to

the attention of the Court relevant matters not already brought to its attention by the parties and may be of considerable help to the Court.

Harkins prays this Honorable Court will grant his Motion for leave to file the accompanying brief in support of Petitioner so that these relevant matters can be heard.

Respectfully Submitted,



On behalf of Donald L. Harkins by

WILLIAM J. REISDORF (P28570)

189 E. Big Beaver Road, #205

Troy, MI 48083

(248) 689-6996

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INTEREST OF *AMICUS CURIAE* [*]

Amicus curiae, Donald L. Harkins, is a resident of the State of Michigan and a citizen of the United States. His interest in this case is purely in the interest of justice in that he believes that both the trial court and the appellate courts have allowed the Army Corp of Engineers (herein"Corps") to redefine the term "waters of the United States" in an unlawful matter which would expand the Corp's jurisdiction under the Clean Water Act to include almost all "public lands of the United States". Furthermore, Harkins seeks to eliminate the unfair double layer of regulation by the State of Michigan and then the Corp which for practical purposes are mirror images of each other and require the land owner to meet similar burdens in order to obtain permits. Amicus curiae (hereinafter "Harkins") seeks a ruling in this matter which would protect the titles and vested property interests of millions of United States land owners.

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[*] Pursuant to Rule 37.6 of the Rules of this Court, amicus curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, a private citizen, or his counsel, has made a monetary contribution to the preparation or submission of this brief.

FACTUAL SUMMARY

Petitioners, June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker (collectively, "Carabells") own 19.61 acres of property in Chesterfield Township, Macomb County, Michigan. Since 1987, the Carabells have submitted various permit proposals to the Michigan Department of Environmental Quality (herein MDEQ) in order to construct a multi-family condominium development of their property. Their original proposal was for 200 units. Pursuant to a MDEQ Final Determination and Order, in November, 1998 a permit was issued to build a 112 unit alternative condominium development and required Petitioners to replant and restore 3.74 acres of wetland. The reduction in size of the project from 200 units to 112 units and reduction in fill of 15.87 acres down to approximately 12 acres was required under Michigan's Wetland Protection Act (M.C.L. 324.101) in order to reduce the environmental impact down to a level where there would be no unacceptable impact on the natural resources of the State.

The Army Corp of Engineers (herein "Corps") did not agree with the MDEQ's Final Determination and Order and notified the

Carabells that they also have jurisdiction over their property under the Clean Water and Air Act (herein CWA) and that they would have to apply for a permit to discharge fill into the "waters of the United States".

On August 23, 1999, the Corps received a permit application from the Carabells. AR Vol 1, Doc. 2. The Carabells essentially requested that the Corps approve the MDEQ permit. On October 5, 2000, the Corps sent the Carabells a letter denying the permit along with summary findings. AR Vol. 1, Doc 76. Harkins suggests to the Court that it is not necessary to elaborate on the reasons for the Corps permit denial. This is because this appeal is limited to the determination of whether or not there is jurisdiction under CWA not whether Corps' denial was arbitrary or capricious.

The Carabells then sought Administrative Appeal of the federal permit denial before both the US District Court in Detroit and the United States Court of Appeals for the Six Circuit. These appeals both upheld the Corps' denial. On October 11, 2005, this Honorable Court granted Certiorari to hear Petitioners' appeal

ARGUMENT I

The Clean Water Act **does not** extend to wetlands that are hydrologically isolated from any of the "waters of the United States".

ARGUMENT II

The limits on Congress' authority to regulate Interstate commerce **preclude** an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States".

COMBINED LEGAL AND FACTUAL ANALYSIS

The question of jurisdiction in this matter presents a mixed question of fact and law. Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(a) requires landowners to obtain permits from the Corps before they discharge fill material into "navigable waters". Congress has defined "navigable waters" as "waters of the United States", including the territorial seas." 33 U.S.C. 1362(7). The Conference Report which accompanied the CWA included the statement that the conferees "intend that the term 'navigable waters'

be given the **broadest constitutional interpretation."** S. Conf. Rep. No. 92-1236, at 144 (1972). 1

In *United States v. Riverside Bay View Homes, Inc.* , 474 U.S. 121 (1985) The Court held that "the language, policies and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other "waters of the United States." pp. 131-139. As a result of this ruling, the EPA and the Corps have redefined "water of the United States" 33 C.F.R. 328.3(a 11-13-86 to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction.....

In the Corps' 1974 regulations, Section 404(a) defined "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1).

(4) All impoundments of water otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Armed with this new definition of "waters of the United States", the Corps has determined that Carabells' State Permitted Activity of filling approximately 12 acres of wetlands requires a federal permit since the activity discharges fill material into " navigable waters" or onto "land beneath navigable waters".

In making the determination that Carabells' property is included within the definition of "waters of the United States" the Corps apparently relied upon the following facts. (reading from the Sixth Circuit Court of Appeals' opinion page 1):

"In prehistoric times, this property was submerged under Lake St. Clair. As the lake receded over time, some areas of the Carabells' property remained covered by wetlands. Today, the property–located one mile northwest of Lake St. Clair....".

Carabells' property is no longer adjacent to or contiguous to Lake St. Clair as demonstrated by the fact that it is separated from the lake by one mile of numerous residential subdivision developments. (Pg 2. Carabells' C of A Brief). In order to gain jurisdiction over Carabells' property, the Corps has determined under 33 C.F.R. 328.3(a)(5), that Carabells' property is some how (however remotely) hydrologically connected to "navigable waters" because rain water runoff from his property might drain into Lake St. Clair. In summary, the Corps' position in that because Carabells' property may have been submerged land, perhaps in prehistoric times or more recently, and that his property was at some point in time "land beneath navigable water" of Lake St. Clair or one of its tributaries, it therefore is still part of "waters of the United States".

Amicus curiae (hereinafter "Harkins") brings to the attention of this Honorable Court that both the Supreme Court's decision in *Riverside Bay View Homes, Inc, supra,* as well as the EPA and Corps subsequent redefinition of "water of the United States" are inconsistent with definitions in other acts of Congress, the United States Code as well as case decisions of this Honorable Court, and

state appellate courts..

It is Harkins' position that the definition of "water of the United States' should be consistent under the CWA and the Submerged Land Act 43 U.S.C. 1301 (herein SLA). The SLA under 43 U.S.C. 1301(f) states;

> " the term "**lands beneath navigable waters**" **does not** include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and **if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;"**

This notion that only unpatented bottom land is within the jurisdiction of the United States is not a new concept. This Honorable Court on June 6, 2005 in *State of Alaska v. United States* 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005) decided a dispute as to whether title under certain submerged land was conveyed by the United States to the State of Alaska thereby using the definition of

"waters of the United States" under the SLA. Furthermore, *Executive Order 11990* entitled **Protection of Wetlands** signed by President Jimmy Carter, May 24, 1977 states; "This Order **does not apply to** the issuance by Federal agencies of permits, licenses, or **allocations to private parties for activities involving wetlands on non-Federal property**. It is undisputed that title to Carabells' property was conveyed either by State or Federal patent. It makes no difference whether the Federal Government gave title directly to Carabells' predecessors in title or gave it the State of Michigan who in turn gave title to Carabells' predecessors. The Carabells were able to obtain title to such land.

> "Upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *Ozark-Mahoning Co. v State*, pg 490 37 N. W. 2d 488 citing *United States v. Oregon*, 295 U.S. 1, 55 S.Ct.

610, 615, 79 L.Ed. 1267 April 1, 1935

"The question of whether waters within a state are navigable at the time of the state's admission to the Union is a Federal Question. If such waters in a state are not navigable in fact at time of its admission to the Union, the title of the United States to lands underlying such waters remain unaffected." Id.

The record is clear that the Carabells own the 19.61 acres upon which they seek to develop. The determination of whether the Carabells are heirs and assigns of the original purchaser of a state patent (assumes land under navigable water at statehood) or a federal land (assumes land was under non-navigable water at statehood) is not important. It is only important to note that it came from either a state sovereign or a federal sovereign.

In either event the United States gave up its rights to the land for which title passes. Under *Ozark-Mahoning*, "the rights of the grantee under patents issued by the United States government are fixed and vested as of the dates of the patents." In cases where the lands were transferred to the State, 43 U.S.C. 1314 limits the rights and powers retained by the United States to that of purchase of the

natural resources if they can or condemnation of lands if they must. Specifically under SLA 43 U.S.C. 1311 (2) "the rights and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States....."

It is the Corps' position that the lands Carabells now own were once under Lake St. Clair. Under SLA, these lands would be exclusive jurisdiction of the State. Harkins suggests an example of this law is action is where a natural resource such as oil or gold is discovered under lands upon which the federal government has transferred title to the State, under 43 U.S.C. 1311 (2) the Federal government has no interest in the natural resource. (Except buy or condemnation) The fact the property was conveyed to Carabells or other private parties would have no effect. Now assume that waters recede under the Corps' theory and another Natural Resource Wetlands are created, the Corps newly created definitions of "waters of the United States" now would allow them to come in and regulate. This new definition may also allow them to come forward and claim

the oil and gold in our example.(note, prior to the enactment of 33 C.F.R. 328.3(a), the Corps had no jurisdiction over Carabells' property) Such a result would be repugnant to the SLA and divest the States and Carabells of vested rights through the application of an ex post facto definition of "waters of the United States". The Corps is using this new definition as well as the decision in *Riverside Bay View Homes, Inc., supra,* to change long standing principles of property law.

In the *Riverside Bay View Homes, Inc, supra,* this Court allowed a decision to stand which allows the Corps to regulate wetlands that are adjacent to "water of the United States". A year earlier in 1984, In *Summa Corporation v. California*, 466 U.S. 198, 80 l Ed 2d 237, however, the Supreme Court ruled that a lagoon whose title was confirmed by federal patent to original grantees was held not subject to public trust easement. *Summa Corporation* demonstrates clearly that patented land under water **are not** "waters of the United States." Furthermore, the State of California was prevented from placing a "Public Trust Easement" against the private landowners. Now twenty-one years later, the Corps is being granted jurisdiction over

property which they conveyed either directly or indirectly (through the State) by means of a retro-active change in the definition of "waters of the United States". The net result is that the Corps is being allowed by the lower court decisions to place a "Public Trust Easement" which was not confirmed in the patent process against the Carabells' property. This "public trust easement" requires the Carabells' to leave their property in its natural state and eliminates vested property development rights previously granted by the State of Michigan. Under the "equal footing doctrine", if the State of California can't enact a new law creating a "public trust easement" against private property, neither can the United States Congress or its agencies such as the "Corps." As stated on remand from the Supreme Court, *Summa and Los Angeles v Venice Peninsula Properties*, 205 Cal. App.3d 1522, 253 Cal.Rptr. 331 pg 335, states; "the patent of the government is evidence of title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of **any interest of the United States ..."**

In *Riverside Bay View Homes, Inc., supra*, the record is unclear

as to whether the wetlands adjacent to "navigable waters" of Lake St. Clair were unpatented bottom lands or lands previously conveyed directly or indirectly by the United States. This may account for the very "unusual" ruling in *Riverside Bay View Homes, Inc., supra.* It is Harkins' position that if the land was in fact conveyed under federal patent, then the principles of *Summa and Los Angeles v Venice Peninsula Properties, supra* would apply which would have prevented any Corps jurisdiction. This is because the United States already transferred all rights and interest in the subject property. There was no need for a redefinition of "waters of the United States" because the definition under 43 U.S.C. 1301 is part of a long standing regulatory system under the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands."

Under Michigan law, In the Michigan Supreme Court decision *Oliphant v. Frazho*, 381 Mich 630, the State of Michigan was estopped from preventing a private land owner (claiming title from a U S patent) from filling land under Lake St. Clair which was conveyed to him by the patent.

The application of the newly defined term "waters of the United States" under 33 C.F.R. 328.3 to the Carabells' property represents a sudden change in the bundle of rights granted Michigan property owners under Michigan Law. In *Hughes v. State of Washington* 88 S. Ct. 438 (1967) pg. 296 the Supreme Court notes:

> "to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple asserting retroactively that the property it has taken never existed at all."

It is Harkins' position that the words "State" and "Corps" are interchangeable and the Corps' application of definitions in 33 C.F.R. 283.3 to Carabells' property retroactively asserts that the **vested property rights which it denies** never existed at all.

Under Michigan law, In *Klais v. Danowski* 373 Michigan Reports 262, (1967) pg 272, the Michigan Supreme Court noted:

> "It is settled law in this country that lands underlying

navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to paramount power of congress to control such waters for the purposes of navigation."

Under Michigan law it **would not** have been unlawful for the State of Michigan to have sold Carabells' property to his predecessors in title. This is based upon the fact that the property serves no navigational benefit to interstate commerce because it is located one mile from the nearest body of navigable water and without any navigable connection. Furthermore, *Klais, supra*, pg 276 it states:

"the question is raised whether the patentees and **those claiming under them have lost from the then dry lands originally patented** to them title to so much of the private claims as, subsequent to the date of the patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative.....The Michigan State legislature seems to have recognized a distinction between patented and unpatented lands..."

The Carabells have a vested right to restore their property back to dry land and never lose title should it become submerged due to erosion or rising lake levels. Even though the Carabells had a right to restore their property back to dry land, this right under Michigan Law is subject only to the State's police power to regulate public health, safety and welfare. Carabells' vested rights were perfected during the State of Michigan's permit process. The MDEQ's Final Determination and Order, 9-30-99 is a validation of his vested development rights.

This order mandated that the Carabells downsize their proposed development and be granted a permit allowing them to develop the property according to the MDEQ's alternative plan which minimized any unacceptable environmental harm to the eco-system.

In *Summa, supra*, at pg336, the Court states on the issue of allowing a public trust easement to be placed upon Summa's property:

"It is difficult for us to see how the patent can be described as settling in the grantee a full and **complete** title, while at the same time holding that it was burdened by a servitude of the magnitude of

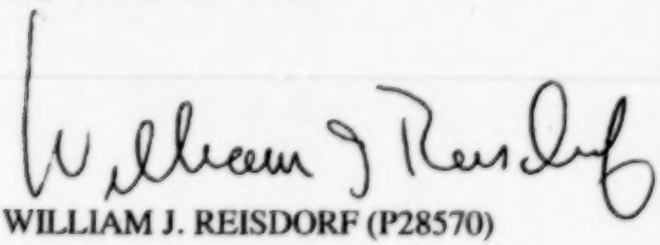
that asserted by the State in this action." The result of allowing the Corps to use its newly created definition of "waters of the United States" under 33 C.F.R. 328.3 to gain jurisdiction over Carabells' property also unreasonably places burdens on Carabells' property which were not part of the patent process and title. Once the federal government gave up title, the Corps was estopped from interfering just as the State of Michigan was in *Oliphant, supra.*.

CONCLUSION

For reasons stated above; the Corps' new definition of "waters of the United States" under 33 C.F.R. 328.3 is illogical and conflicts with other definitions under Title 43 of the Public Lands and the Act of Congress of 1820, An Act making further provision for sale of the Public Lands. These definitions under 33 C.F.R. 328.3 are repugnant to Congress' regulatory scheme for sale of federal land and aversely affect the property titles of millions of U.S. property owners. This Honorable Court should find that these definitions exceed Constitutional limits and are therefore unenforceable. *Amicus Curiae*, Harkins, would ask this Honorable Court to substitute the long standing definition of "waters of the United States" and

recognize that such definition does not include land which the United States has already conveyed to the general public. Furthermore, Harkins would ask this Honorable Court to find the Corps has no Jurisdiction under CWA over Carabells' property.

Respectfully submitted,



WILLIAM J. REISDORF (P28570)

189 E. Big Beaver Road, #205

Troy, Michigan 48083

(248) 689-6996

Nos. 04-1034, 04-1384

DEC 2 - 2005

In The
Supreme Court of the United States

JOHN A. RAPANOS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

–and–

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA SUPPORTING PETITIONERS

MICHAEL J. PEARCE*
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
(602) 346-4600

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF *AMICUS CURIAE* OF HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA

I. INTEREST OF THE *AMICUS CURIAE*[1]

The Home Builders Association of Central Arizona (HBACA) is a non-profit corporation organized in 1951 under the laws of the State of Arizona to provide a means for businesses in the housing and real estate industries in central Arizona to address issues and concerns relating to those industries. Under its association with the National Home Builders Association, HBACA is authorized to represent constituent members in the Arizona counties of Maricopa, Pinal, Apache, Navajo, Gila, Graham, Greenlee, Cochise, Yavapai, Yuma and La Paz. These counties represent a vast territory in Arizona, with very diverse hydrogeology, topography, natural and man-made drainage, and with a very rapidly expanding population.

Defining "navigable waters" across this diverse and mostly arid region affects many aspects of the home building industry. Land development in Arizona often involves crossing small natural drainages and rerouting

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[1] Pursuant to Rule 37.3(a), Rules of the Supreme Court, *amicus curiae* Home Builders Association of Central Arizona states that letters of consent have been obtained from the United States of America and Petitioners in both cases. The consent of the United States of America is filed herewith. The consent of Petitioner Carabell is filed herewith. Consent from the Petitioner Rapanos is already on file with the Clerk.

Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amicus curiae* Home Builders Association of Central Arizona state that they authored this brief in whole; no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution for preparation or submission of this brief.

man-made irrigation canals. Thus, an overly expansive definition of navigable waters has a direct and immediate impact on site preparation – the very foundation of new home construction.

HBACA is also interested in the social policy of affordable housing in Arizona. Too often, when regulatory policies affecting growth and development are being implemented at the federal level, the impact on locally affordable housing is overlooked. Policy-level decision-makers within most governmental agencies are not typically affected by lack of affordable housing in places like Arizona, yet their policy decisions directly affect our costs. HBACA is close to the issue of affordability at the retail homebuyer level, and is therefore in a unique position to comment on the true cost of these regulatory programs.

II. SUMMARY OF THE ARGUMENT

The United States Army Corps of Engineers defines "navigable waters" under the Clean Water Act to include all tributaries, and tributaries of tributaries, of traditionally navigable waters, up to the ordinary high water mark of any such tributary. In Arizona, this results in federal land use regulation at the micro level, dictating alternatives and mitigation requirements not only under the Clean Water Act, but also under the National Environmental Policy Act and the Endangered Species Act.

Once within jurisdiction, federal regulation spreads beyond just the impact on the "navigable water" and includes all of the land within the proposed development project. This type of federal regulation exacerbates an already acute crisis in affordable housing in Arizona.

This type of federal regulation also extends beyond Congress' intent in creating the Clean Water Act, which expressly protects the rights of States to control local land use planning decisions. Like the migratory bird rule that this Court invalidated in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001), the regulation of tributaries in this fashion exceeds the authority granted under the Clean Water Act.

We urge the Court to reverse the decision in these two consolidated cases and set forth guidelines that will enforce the requirement of a significant federal nexus between navigable-in-fact waters and their tributaries.

III. ARGUMENT

Any law that affects the cost of housing in Arizona affects HBACA. The definition of "navigable waters" at issue in these two consolidated cases is such a law.

The Clean Water Act (CWA)[2] establishes two regulatory permitting programs for discharges to "navigable waters."[3] Section 404 requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the U.S. Army Corps of Engineers (Corps), with oversight by the U.S. Environmental Protection Agency

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[2] Also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

[3] The term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), which is in turn defined by regulation to include not only all traditional navigable waters, but also all "impoundments of water otherwise defined as waters of the United States" and "[t]ributaries of waters" of the United States and "wetlands adjacent to waters" of the United States. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(4), (5) and (7).

(EPA).[4] Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, requires a permit for discharge of pollutants (other than dredged or fill material) into navigable waters and is administered by EPA.[5]

The two cases at issue here, *Rapanos v. United States*, Cause No. 04-1034,[6] and *Carabell v. United States Army Corps of Engineers*, Cause No. 04-1384,[7] involve the extent of federal CWA jurisdiction over the use of fill material on private lands that contain waters that may, or may not, be classified as navigable waters within the meaning of the CWA. They both turn on the reach of federal authority over so-called adjacent wetlands – that is, wetlands that are adjacent to navigable waters but which are not, themselves, navigable waters. In this inquiry, the Court of Appeals for the Sixth Circuit noted:

> What is required for CWA jurisdiction over "adjacent waters," however, is a significant nexus between the wetlands and 'navigable waters' which can be satisfied by the presence of a hydrological connection.[8]

Apparently, however, not even a "hydrological connection" is required in some cases. For example, the Court of Appeals for the Ninth Circuit has recently held:

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[4] 33 U.S.C. § 1344 (herein referred to as "§ 404").

[5] 33 U.S.C. § 1342.

[6] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004).

[7] *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

[8] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004) (citations omitted).

> The Corps' jurisdiction over wetlands falling within the adjacency clause in 33 C.F.R. § 328.3(a)(7) does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States.[9]

Thus, despite the fact that the *Baccarat* court emphasized that it was joining the reasoning of the Sixth Circuit in *Carabell*, it held that mere adjacency of the wetland to a navigable water establishes the federal nexus, and therefore the existence of federal jurisdiction over the private property at issue.[10]

Of course, the wetlands at issue in these cases are seldom adjacent to navigable waters in the traditional sense. Instead, they are usually adjacent to a drainage ditch, which may flow into another ditch, and perhaps another, before reaching a small stream which eventually empties into a body of water that is traditionally "navigable." This particular reach of federal jurisdiction stems not from adjacency, but from the upstream application of the so-called "tributary rule." 33 C.F.R. § 328.3(a)(5).[11]

In Arizona, the tributary rule is the most expansive part of the current regulatory definition. As implemented by the Corps, it means that every tributary of a traditional navigable water is in itself a "navigable water" under the CWA. Therefore, waters of the United States include not

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[9] *Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*, 425 F.3d 1150, 1158 (9th Cir. 2005).

[10] *Id.* at 1157.

[11] *See United States v. Deaton*, 332 F.3d 698, 705 (4th Cir. 2003); *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001).

just direct (or primary) tributaries but all secondary, tertiary and higher order tributaries to the highest headwater limit of the tributary system.[12]

The sole traditional navigable water in Arizona is the Colorado River.[13] Because of the tributary rule, however, even the driest ephemeral drainages and remote stock tanks are considered "navigable waters" because they have the potential to drain into larger washes that eventually may drain into intermittent streams that eventually may drain into the Colorado. These higher order "tributaries" are small arroyos that may not see water for years and may be tens or even hundreds of miles from the nearest "wet" water. These are not adjacent wetlands. They are in fact dry lands that are adjacent to more dry lands that may eventually drain ephemeral storm runoff into a tributary of a true navigable water.

In Arizona, land and site development often involves construction of road and utility crossings over these small washes, and the relocation of old irrigation canals or stock tanks. Because the Corps and EPA consider these "navigable waters," the reshaping or crossing typically results in discharges of fill material requiring a permit under Section 404 of the CWA.

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[12] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[13] Almost the entire State of Arizona lies within the Colorado River Basin. *See Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963). Arizona's second most productive river, the Salt River portion of the Gila River system, has been declared non-navigable in fact in the Phoenix metropolitan area by the Arizona Navigable Stream Adjudication Commission. *See Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila Confluence*, Arizona Navigable Stream Adjudication Commission No. 03-005-NAV (Sept. 21, 2005).

The Section 404 permit process imposes substantial burdens. Under EPA Guidelines, all discharges to waters of the United States must be avoided to the extent practicable.[14] Discharges that are permitted must be mitigated by appropriate and practical steps to "minimize potential adverse impacts of the discharge on the aquatic ecosystem."[15] Considering that there are no "aquatic ecosystems" to impact, regulation of these dry areas defies the logic of a federal hydrologic or aquatic nexus to interstate commerce.

Not only is the permit process itself expensive and time consuming, the fact that a federal permit is required triggers additional regulatory requirements under the National Environmental Policy Act (NEPA)[16] and the Endangered Species Act (ESA).[17] As discussed later in this brief, the assertion of jurisdiction over these small washes, stock tanks and ditches raises significant constitutional and federalism concerns. To put the matter in context, however, it is helpful first to look at the housing situation in Arizona and its relationship to the private land base.

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[14] 40 C.F.R. § 230.10(a).

[15] *Id.* at § 230.10(d).

[16] 42 U.S.C. §§ 4321 *et seq.* *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (real estate development in northeast Phoenix enjoined based on Corps' alleged violation of NEPA in issuing a § 404 permit for road and utility line crossings).

[17] 16 U.S.C. §§ 1531 *et seq.* *See Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000) (suit to enjoin construction of high school on grounds that it would result in possible take of cactus ferruginous pygmy-owl).

A. Affordable Housing Is Becoming an Acute Issue in Arizona

In Arizona, the question of affordable housing has raised sufficient concern at the state level to create the Arizona Department of Housing[18] and the Arizona Housing Commission.[19] Jointly, these entities have undertaken to study affordable housing issues in Arizona and prepare a report on the subject. The report, entitled *Affordable Housing Profile*, studies the affordable housing "gap" between Arizona households seeking housing and the number of available units.[20] It describes this concept as follows:

> One of the primary objectives of this study is to identify the "affordability gap" for the State. The "gap" is the difference between the number of households within each income range and the number of housing units affordable to those households. It typically occurs at the lower end of

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[18] The Arizona Department of Housing was created in 2001 and became operational on October 1, 2002. 2001 ARIZ. SESS. LAWS Ch. 22, §§ 18, 22. It is an agency of the State of Arizona, authorized by statute to "address the affordable housing issues confronting this state. . . ." ARIZ. REV. STAT. ANN. § 41-3953(A) (2003). The agency's official website is http://www.housingaz.com.

[19] The Arizona Housing Commission is an advisory commission also created by Arizona to "recommend housing strategic planning and policy." ARIZ. REV. STAT. ANN. § 41-3954(B)(1). The members include rural and non-rural representatives, one member of a tribal government, one member of a tribal housing department, and various other interests groups. *See id.*, § 41-3954(A).

[20] Arizona Housing Commission, Arizona Department of Housing, *Arizona Affordable Housing Profile, Findings and Conclusions* (2002). The report is available on the Arizona Department of Housing website. http://www.housingaz.com/hc/default.asp. The report notes "Arizona is the first state to commission a profile of this kind." *Id.* at i.

> the income range where there are more households than affordable units. For these households to find housing in the community, they must pay more than 28% of their income toward shelter or live in substandard and/or over-crowded conditions.[21]

The report states that, as of 2000, the total affordability gap for the State of Arizona "is estimated at 194,700 households or about 10.3 percent of all households including those on Native American reservations. . . . [C]ertain counties, such as Coconino, Santa Cruz and Yavapai, have affordability gaps higher than 15%."[22]

Importantly, the report also concludes:

> Each community's housing needs are different and individual solutions and strategies must be tailored to the particular situation.[23]

This element of affordable housing – local community differences and the need for local solutions – relates directly to the need for clarification of federal regulatory control over land use planning at the local level.

In examining the cost of housing in Arizona, the Arizona Housing Commission also prepared a report entitled *The State of Housing in Arizona*.[24] This report focuses on the reasons for high housing costs and the concomitant lack of affordable housing. It identifies six

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[21] *Id.* at 1.

[22] *Id.*

[23] *Id.* at 2.

[24] Arizona Housing Commission, *The State of Housing in Arizona* (2000). This report is available on the State of Arizona Department of Housing web page, http://www.housingaz.com/hc/default.asp.

factors contributing to the price of a home: Construction material and labor (50-55%); land acquisition and site improvement costs, including infrastructure (20-24%), builder overhead (12-14%), government fees (including the cost of regulations) (8-10%), builder profit (3-5%), and city, county and state sales taxes (3%).[25]

Significantly, "the most frequently mentioned barrier to affordability within the construction process was the limited amount of land for private development."[26] The Report notes that, while almost half of the land in the State of California is privately held, only 17% of the land in Arizona is in private hands. The remainder is in public ownership.[27] As to this issue of lack of land, the report concludes that the influence of government on this barrier to housing affordability is "pervasive," ranging from public land policies and open space requirements to zoning and taxation.[28]

In Arizona, pervasive restrictions on the use of private land to protect "aquatic ecosystems" in dry washes translate into increased housing costs and more limits on available land. The nature and extent of these types of land use restrictions, and the balance between them and housing affordability, are issues of unique local concern.

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[25] *Id.* at 32-33.

[26] *Id.* at 37.

[27] Of Arizona's total land base, 27% is held in Indian reservation status. The Federal Government owns an additional 42%, which is variously administered by the Bureau of Land Management, the Bureau of Reclamation, the Nation Park Service, the National Forest Service and other federal agencies. Finally, the State of Arizona owns 14% of the total land base. *Id.* at 18.

[28] *Id.* at 37.

The difficulties experienced in attempting to comply with federal land use policies at the local level demonstrates the wisdom of Congress, expressed in 33 U.S.C. § 1251(b)[29] to limit the reach of federal land use planning to issues of truly national concern.

B. Implementation of the Tributary Rule by the United States by the Corps of Engineers Demonstrates the Impact of Federal Regulation on Local Land Use Planning

As stated in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[30] regulation of land use is a function traditionally performed by local governments. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.[31] Interpretation of the CWA should preserve the ability to deal with issues of local concern at the state and community level and thus avoid "the significant constitutional and federalism questions" raised by federal jurisdiction over an entire project

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[29] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, ***to plan the development and use (including restoration, preservation and enhancement) of land and water resources***, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b) (emphasis added).

[30] 531 U.S. 159, 174 (2001).

[31] *Id., quoting in part from Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994).

by virtue of an ephemeral wash, stock tank or irrigation ditch that happens to cross the property.

But the balance has shifted in Arizona. Federal jurisdiction, based on the application of the tributary rule, is indeed "pervasive." For example, the Administrative appeal decisions of the Corps of Engineers South Pacific Division, which includes Arizona, illustrate the broad jurisdictional reach of the term "navigable waters" as currently applied in Arizona.[32]

In one such case, the Corps assumed jurisdiction over a desert wash across private property in Tucson based on the wash's connection, through a series of downstream but apparently unnamed washes, to the Santa Cruz River, which is tributary to the Gila River, which is in turn tributary to the navigable Colorado River over 200 miles away. The jurisdictional delineation included a one-foot wide man-made channel.[33]

Another case involved a remote stock tank. In Arizona, stock tanks are typically constructed in low areas of natural drainage to capture runoff for cattle watering purposes. As such, they are "impoundments" of a tributary of a navigable water, making the tank itself, under current Corps policy, a navigable water regulated under the CWA, even if the hydraulic connection to downstream waterways

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[32] The appeals are conducted pursuant to 33 C.F.R. Part 331. These decisions are published at the Corps South Pacific Division website at http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/admin/Appeals/index.htm. The decisions themselves do not have precedential effect and are being cited here only for, illustrative purposes. 33 C.F.R. § 331.7(g).

[33] *Approved Jurisdictional Determination for the Sunrise Office Park*, p. 3 (September 7, 2001).

was thereby severed. In this example, the Corps asserted jurisdiction over a stock tank based on a historic tributary connection that "disappeared sometime after 1952."[34]

Once under the jurisdiction of the CWA, modification of these dry washes and stock tanks for land development also requires administrative compliance with NEPA and ESA. For example, in *Defenders of Wildlife v. Flowers*, 414 F.3d 1066 (9th Cir. 2005) (petition for rehearing pending), a private real estate development became embroiled in an ESA dispute because the landowner sought a § 404 permit to impact 0.78 acres of a desert wash for road and utility line crossings.[35] Despite the small impact on the washes themselves, the United States Fish and Wildlife Service maintained that "the total impact of the development which would be authorized by your agency [the Corps] should be assessed" and that "the footprint of the project to be permitted by your agency extends beyond the limits of jurisdictional waters and is, at minimum, the total 440 acres of development."[36] Thus, for 0.78 acres of impact to

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[34] "The District stated as clarifying information at the appeal conference that they considered T-Bone Tank and Wash 1 as within CWA jurisdiction because of an historical tributary connection from Wash 1 to Scatter Wash, about 2 miles south of the site, that existed prior to 1952. The District stated that this connection would have had an OHWM [Ordinary High Water Mark] prior to 1952. The District further stated that this tributary connection with an OHWM between T-Bone Tank and Scatter Wash disappeared some time after 1952." Administrative Appeal Decision, *Approved Geographic Jurisdiction for the Valley Vista Property*, p. 2, Los Angeles District, File number 2002-01321-SDM (January 31, 2003).

[35] The precise facts of the case are set forth in more detail in the unpublished decision of the district court, *Defenders of Wildlife v. Flowers*, 2003 WL 22145716 (D. Ariz. August 18, 2003).

[36] *Id.* at *4.

dry washes over 150 miles from the Colorado River, the entire development was subject to intensive regulation under the ESA.[37]

Nor are these cases isolated instances. Because so much land in Arizona has these small washes, federal permits under § 404 of the CWA are frequently required. If then subjected to consultation under § 7 of the ESA, the landowner can be regulated to the point of requiring new residents to maintain their pets on leashes.[38]

These cases illustrate the impact of finding navigable waters in the arid "dry-lands" of Arizona. The result is federally mandated land use planning in areas outside the traditional reach of the Commerce Clause of the United States Constitution.[39] This federal role should be limited by more clearly articulated standards on the federal "nexus" required to assert jurisdiction under the Commerce Clause.

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[37] The Corps had issued a "no effect" determination on the impact to the cactus ferruginous pygmy-owl based on the fact that no pygmy-owls had been found to live within the project area and that the critical habitat designation, which had once applied, had been vacated by the district court and affirmed on appeal. 414 F.3d at 1070.

[38] The biological opinions issued in response to § 404 permit applications in Arizona may be found on the Arizona Ecological Services Office website under the Document Library tab, http://arizona es.fws.gov. The reference made here is to the opinion issued for a mixed-use development in Marana, Arizona dated July 9, 2003, at p. 5.

[39] U.S. CONST., Art. I, § 8, cl. 3.

C. The Reach of the Federal CWA Should be Limited to Matters within the Proper Ambit of the Commerce Clause

As noted in *United States v. Morrison*, 529 U.S. 598, 617-18 (2000), "[t]he Constitution requires a distinction between what is truly national and what is truly local." These words speak well to the issue of defining "waters of the United States" in terms that extend the reach of the federal permitting programs under the CWA. Permitting at the federal level is cumbersome, expensive and time consuming. It is necessary when national issues are at stake, but it is inappropriate when federal permitting requirements operate to displace local authority, and responsibility, for insuring the local welfare.

Soon after the adoption of the CWA in 1972, EPA began developing regulations to define "waters of the United States." EPA's General Counsel viewed the deletion of the word "navigable" from the definition of "waters of the United States" as "significant":

> The [legislative history] indicates that the new definition of "navigable waters" is to "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[40]

Counsel then opined on the types of waters that would be regulated, and included both navigable waters and tributaries of navigable waters in the list.[41] Later that

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[40] EPA General Counsel Opinion (Feb. 6, 1973), *quoting* S. Rept. No. 92-1236 at 144.

[41] *Id.*

same year, EPA issued its regulations defining "waters of the United States" and, in apparent reliance on the counsel opinion, included "[t]ributaries of navigable waters of the United States" as a category of jurisdictional waters.[42]

In its initial rulemakings, the Corps defined "navigable waters of the United States" in its regulations without reference to tributaries.[43] The 1974 revisions to the definition of "navigable waters" more fully addressed the CWA amendments, but still made no reference to tributaries.[44] This interpretation was challenged in *Natural Resources Defense Council v. Callaway* (*NRDC*),[45] where the court held that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the term "navigable waters" was "not limited to the traditional tests of navigability."[46] The court therefore held that the Corps' limited exercise of jurisdiction over tributaries was unlawful.

Within weeks of the *NRDC* decision, the Corps proposed regulations on how to define "waters of the United States."[47] The Corps proposed two basic alternatives for regulating tributaries. The first would regulate "all navigable waters up to their headwaters and all tributaries of navigable waters up to their headwaters." The second, less expansive definition (and the one favored by the Corps)

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[42] 38 Fed. Reg. 13528, 13529 (May 22, 1973).

[43] *See* 37 Fed. Reg. 18289 (Sept. 9, 1972).

[44] 39 Fed. Reg. 12115 (April 3, 1974).

[45] 392 F. Supp. 685 (D.D.C. 1975).

[46] 392 F. Supp at 686.

[47] 40 Fed. Reg. 19766 (May 6, 1975).

would regulate all navigable waters up to their headwaters and all "primary" tributaries of such waters up to their headwaters.[48]

By July of 1975, however, the Corps' published "interim final regulations" that selected the broadest possible regulatory approach to tributaries. In this rule, navigable waters were defined to include "[a]ll tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark."[49] The preamble stated that "[w]ith respect to the inland areas of the country, Corps jurisdiction under Section 404 of the [CWA] would extend to . . . all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States." The Corps' 1977 final regulations modified this definition of tributaries to exclude the headwater requirement.[50]

In 1978, EPA published proposed revisions to its definition of waters of the United States that would have broadened the 1973 definition to include additional waters.[51] The change was proposed "to more accurately reflect which waters are subject to the requirements of the [CWA]. Consistent with legislative history, judicial interpretations, and longstanding EPA policy, the term covers all waters which may be regulated by the Federal Government within

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[48] 40 Fed. Reg. at 19767.

[49] 40 Fed. Reg. 31320, 31323-24 (July 25, 1975).

[50] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[51] 43 Fed. Reg. 37078 (August 21, 1978).

constitutional limits. . . ."[52] In 1982, the Corps regulations were brought in line with EPA's.[53]

Thus, prior to *SWANCC, supra*, the general view of EPA and the Corps regarding the scope of their jurisdiction under the CWA was that, by leaving out the word "navigable," Congress intended to regulate all waters that could be reached through Congress' plenary authority over interstate commerce. This view was unequivocally rejected by this Court in *SWANCC*: "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. . . . The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[54]

Yet, as demonstrated by the two consolidated cases currently before the Court, the tributary rule continues to rest on the faulty presumption of this expansive jurisdiction, notwithstanding Congress' explicit recognition of the rights of States in 33 U.S.C. § 1251(b) of the CWA.

In these consolidated cases, the United States Army Corps of Engineers has asserted, and the Court of Appeals for the Sixth Circuit has affirmed, jurisdiction over wetlands on private property because the wetlands are adjacent to

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[52] *Id.* at 37079. *See also* 44 Fed. Reg. 32854, 32901 (June 7, 1979) (revised definition).

[53] 33 C.F.R. § 323.3(a)(5) (1982).

[54] 531 U.S. at 172.

drainage ditches that are deemed, by virtue of the tributary rule, to be navigable waters.

In *Carabell*, the court noted:

> [T]he unnamed ditch running along the hypotenuse of the Carabells' triangle-shaped property is separated from wetlands only by a man-made berm or barrier. At its northeastern end, the ditch is connected to the Sutherland-Oemig Drain, a drain that empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. At its southwestern end, the ditch is connected to other ditches, which – like the Sutherland-Oemig Drain – outlet into the Auvase Creek and eventually into Lake St. Clair. The ditch, then, is connected on either end to tributaries of "waters of the United States" as defined in the regulations.[55]

In *Rapanos*, the district court had originally noted, in reference to the Salzburg site:

> The government argues that Defendant's wetlands had a "surface hydrological connection" to a ditch dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay. The nearest body of navigable water to Defendant's property is the Kawkawlin River. . . . Thus, the nearest body of

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[55] 391 F.3d at 708.

> navigable water to Defendant's property is roughly twenty linear miles away.[56]

The Court of Appeals affirmed jurisdiction under the CWA in both instances on the principle that the "hydrological connection" provided a "significant nexus" between the wetlands and the tributaries to navigable waters.[57]

Importantly, the Court of Appeals acknowledged in its reasoning:

> Since *SWANCC* this court has noted:
>
> * * *
>
> There is also a nexus between a navigable waterway and its nonnavigable tributaries. . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted.[58]

This hard and fast rule should not pass constitutional scrutiny under *Morrison* or *SWANCC* because it knows no bounds between issues of national or local concern. For the reasons discussed in the next section, the rule adopted by the Court of Appeals for the Sixth Circuit is legally erroneous should be reversed. A more moderate approach to federal land use control should be adopted.

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[56] *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1014-15 (E.D. Mich. 2002).

[57] *See Rapanos*, 376 F.3d at 642; *Carabell*, 391 F.3d at 710.

[58] *Carabell*, 391 F.3d at 709-710, *quoting from United States v. Rapanos*, 339 F.3d 447, 452 (6th Cir. 2003).

D. The Tributary Rule Impermissibly Continues to Regulate All Tributaries, Regardless of Their Relationship to Downstream Navigable Waters.

The blanket nature of the current tributary rule mirrors the now-discarded migratory bird rule at issue in *SWANCC*.[59] Like the migratory bird rule, the tributary rule was developed as a way to broadly identify any and all waters that Congress could conceivably regulate under its interstate commerce authority, regardless of navigability. Like the migratory bird rule, the tributary rule reaches too far.

First, there is no definition of "tributary" in the rules. Courts have been left to develop their own *ad hoc* definitions or defer to the Corps' judgment. *See Headwaters, Inc. v. Talent Irrigation Dist, supra* (quoting the dictionary definition of tributary as "a stream which contributes its flow to a larger stream or other body of water.").[60] *See also United States v. Deaton, supra* ("We conclude that the regulation is ambiguous on the question of how far the coverage of tributaries extends. We therefore turn to the agency's interpretation. . . . In short, the word 'tributaries' in the regulation means what the Corps says it means.").[61]

Headwaters and *Deaton* both proceed from the assumption that blanket regulation of tributaries is constitutionally permissible. Yet the assumption itself – that all tributaries of navigable waters, no matter how far removed, and no matter how limited the hydraulic connection, can be

[59] 531 U.S. 163-164 (discussion of migratory bird rule).

[60] 243 F.3d at 533.

[61] 332 F.2d at 710-11.

regulated – does not pass the "significant nexus" test of *SWANCC*.

Rather, the reasoning of the Court of Appeals for the Fifth Circuit in *In re Needham*, 354 F.3d 340 (5th Cir. 2003) is more in line with the reasoning of *SWANCC*. There, the court held:

> [I]n this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."[62]

We know from experience in Arizona that the reach of the CWA, in the agency view, extends to the smallest ephemeral washes, stock tanks and roadside ditches, regardless of the extent of hydrologic or ecological connection to navigable waters or aquatic ecosystems. The effect of the tributary rule, as implemented in Arizona, is to control land use planning at the federal level by not only regulating any modification of these small ephemeral drainages, stock tanks or irrigation ditches, but also by dictating alternatives and mitigation requirements for the entire development. Such regulation is not consistent with Congressional intent, as directly expressed in the CWA, and runs afoul of constitutional limitations on federal authority under the Commerce Clause.

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[62] 354 F.3d at 345-46.

IV. CONCLUSION

If "navigable waters" can be defined so broadly as to include wetlands adjacent to a drainage ditch that is "roughly twenty miles" from the nearest navigable river,[63] virtually every parcel of private land in the State of Arizona will be classified as subject to jurisdiction under the CWA because it has a wash, stock tank or irrigation ditch that is "tributary" to the Colorado River. This rule results in federal regulation of land use planning at the micro level that is unnecessary and inconsistent with the limitations Congress intended on the CWA, as emphasized by this Court in the *SWANCC* decision.

The over regulation of land use by the federal agencies is having a direct impact on the affordability of housing in Arizona, where only 17% of the State's land base is in private ownership. On behalf of the home building industry in Arizona, HBACA asks this Court to reverse the decision of the Court of Appeals for the Sixth Circuit in these two consolidated cases and establish better guidelines for a determination of the "significant federal nexus" between navigable-in-fact waters and their tributaries.

Respectfully submitted this 2nd day of December, 2005

MICHAEL J. PEARCE
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
(602) 916-5335
(*Counsel of Record*)

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[63] *United States v. Rapanos, supra*, 190 F. Supp. at 1012.

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Supreme Court of the United States

JOHN A. RAPANOS, et ux., et al.,
Petitioners,
v.
UNITED STATES,
Respondent.

JUNE CARABELL, et al.,
Petitioners,
v.
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL MULTI HOUSING COUNCIL, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, REAL ESTATE ROUNDTABLE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN RESORT DEVELOPMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

GUS BAUMAN
(Counsel of Record)
FRED R. WAGNER
W. PARKER MOORE
BEVERIDGE & DIAMOND, P.C.
1350 I St, NW, Suite 700
Washington, DC 20005
Counsel for Amici Curiae
(202) 789-6000

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INTERESTS OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the International Council of Shopping Centers, National Multi Housing Council, National Association of Industrial and Office Properties, Real Estate Roundtable, Associated General Contractors of America, American Resort Development Association, and National Association of Real Estate Investment Trusts, as *amici curiae*, respectfully submit this brief in support of Petitioners John A. Rapanos, *et ux.*, *et al.* and June Carabell, *et al.*[1]

Amici curiae are associations representing a wide variety of entities and individuals that own, develop, purchase, sell and improve land in the 50 states and the District of Columbia. Members of *amici* hold and control land as owners and managers of commercial, industrial, institutional and multi-family property; facilitate the purchase and sale of land as real estate brokers and agents; and work the land as developers, contractors, equipment operators and laborers. *Amici* have a substantial interest in the establishment of proper and predictable boundaries to the U.S. Army Corps of Engineers' wetlands jurisdiction under the Clean Water Act.

The International Council of Shopping Centers ("ICSC") is the premier global trade and professional association of the retail real estate industry. ICSC's more than 50,000 members include shopping center owners, developers, managers, marketing specialists, investors,

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[1] The *amici* have received the parties' written consent to submit this brief. Letters of consent have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of this Court, no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to its preparation and submission.

retailers and brokers. Shopping centers are America's marketplace, representing economic growth, environmental responsibility and community strength.

The National Multi Housing Council ("NMHC") represents the largest and most prominent apartment firms in the United States. NMHC members are engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research and promotes the desirability of apartment living.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading trade association for developers, owners, investors and asset managers in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP is comprised of more than 13,000 members in 50 North American chapters and provides networking opportunities, educational programs, research on trends and innovations, and legislative representation.

The Real Estate Roundtable ("Roundtable") brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of national real estate trade associations to address key national policy issues relating to real estate and the economy, including environmental and land use issues. Collectively, Roundtable members hold portfolios containing over five billion square feet of developed property valued at more than $450 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

The Associated General Contractors of America ("AGC") is the oldest and largest national trade association in the construction industry. A non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 32,000 firms in more than 98 chapters throughout the United States. AGC members include more than 7,000 of the nation's leading general contractors, 11,000 specialty contractors and 13,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities and multi-family housing units; and they prepare sites and install the utilities necessary for housing development.

The American Resort Development Association ("ARDA") is the trade association representing the vacation ownership and resort development industries. Established in 1969 as the American Land Development Association, ARDA today has close to 1,000 members, ranging from privately held companies to major corporations in the United States and overseas. ARDA's diverse membership includes companies with interests in vacation ownership resorts, community development, fractional ownership, camp resorts, land development, second homes and resort communities.

The National Association of Real Estate Investment Trusts® ("NAREIT") is the representative voice for United States real estate investment trusts ("REITs") and publicly traded real estate companies worldwide. Members are REITs and other businesses that own, operate and finance income-producing real estate as well as those firms and individuals who advise, study and service these businesses.

SUMMARY OF ARGUMENT

Following enactment of the Clean Water Act ("CWA"), the U.S. Army Corps of Engineers ("Corps") dutifully applied its jurisdiction under Section 404 of the statute by regulating direct pollutant discharges into navigable waterways. Over time, without any additional congressional grant of authority and despite this Court's rulings in *Riverside Bayview* and *SWANCC*, the Corps has extended its jurisdiction further and further inland to encompass an expanding range of non-navigable "waters" and remote hydrologic features. This jurisdictional metamorphosis continued into 2001, when the Corps' interpretation of its delegated authority extended to virtually any water-bearing topographic feature. This Court was compelled to intervene. The Court explained that federal jurisdiction under the CWA is not limitless and that the Corps could not regulate non-navigable features lacking a significant nexus or inseparable tie to navigable waters.

Nonetheless, just five years later, the Corps has disregarded this Court's instructions and continues to assert jurisdiction over countless non-jurisdictional features, most often remote, intrastate, non-adjacent wetlands, manmade ditches, and other ephemeral seeps. This illegitimate expansion of federal jurisdiction is wreaking havoc on legitimate land development. The Corps has refused to issue regulations shedding light on its perception of the scope of proper federal jurisdiction. As a result, assertions of this jurisdiction vary widely among the 38 individual Corps district offices. Faced with this regulatory uncertainty, private and public property owners are left with little choice but to submit to the Corps'

extravagant claims of jurisdiction and endure the costly and protracted Section 404 permitting program.

In light of this Court's decisions over the scope of federal jurisdiction, the Corps' persistent regulation of remote wetlands and ephemeral trenches is wrong. These intrastate features are far removed from any jurisdictional waters, and they lack a significant nexus to navigable waterways. The very nature of these remote features renders them ecologically incapable of influencing distant navigable waters as the CWA intends and this Court requires. There is simply no basis in science and law for extending federal jurisdiction to these features.

Recognizing the constitutional constraints on its authority under the Commerce Clause, Congress expressly designed the CWA to preserve the States' longstanding authority over intrastate uses of land and water resources. Despite the Corps' ongoing encroachment into the state regulatory domain, the States can, and do, fully regulate the remote features at issue here. Such comprehensive state regulation renders the Corps' unauthorized assertions of federal jurisdiction unnecessary and duplicative. The Corps has trespassed into an area intended to remain within the province of the States, confounding otherwise effective state regulation and undermining legitimate upland development.

ARGUMENT

I. BY INTERPRETING ITS REGULATIONS TO CIRCUMVENT *SWANCC* AND REACH NON-JURISDICTIONAL FEATURES, THE CORPS CONTINUES TO IMPOSE UNAUTHORIZED AND ARBITRARY LIMITATIONS ON UPLAND DEVELOPMENT.

Congress enacted the Clean Water Act to address the impacts of pollutants on the navigable waters of the United States. 33 U.S.C. § 1251, *et seq*. The Act was designed to restore and maintain these waters by eliminating pollutant discharges into them. *Id.* § 1251. Since its enactment nearly 35 years ago, this ambitious statute has made significant strides toward achieving its goals. This progress has resulted from regulating the pollutant sources that discharge into navigable waters. But in the course of this progress, the regulated community has experienced escalating difficulty with the CWA's other regulatory mechanism, the Section 404 program for discharges of dredged or fill material.

In Section 404 of the CWA, Congress assigned to the U.S. Army Corps of Engineers the responsibility of regulating these discharges of dredged or fill material, which may degrade the water quality of navigable waterways and interfere with the conduct of interstate commerce. *Id.* § 1344. Originally, the Corps embraced its delegated authority by faithfully administering the Section 404 permitting program to control pollutant sources discharging directly into navigable waters. H. Michael Keller, *Waters of the United States (How Many Drops Does it Take)*, in *Water Quality & Wetlands* Paper No. 3, 3-11 (Rocky Mt. Min. L. Fdn. 2002). Over time, though, the Corps expanded its interpretation of the scope of federal jurisdiction under Section 404. *Id.* In addition

to regulating discharges directly into navigable waters, the Corps initiated a new policy of asserting jurisdiction over discharges into wetlands adjacent to these navigable waters. *Id.* This expansion led to considerable controversy among the Corps, the States, and governmental as well as private landowners. Continued disputes over federal regulation presented this Court with its first opportunity to review the scope of the Corps' jurisdiction to regulate discharges of pollutants into navigable waters.

A. The Supreme Court Has Determined That Federal Clean Water Act Jurisdiction Does Not Extend to Remote Hydrologic Features.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court acquiesced to the Corps' assertion of jurisdiction over adjacent wetlands.[2] The Court determined that expanding federal jurisdiction to reach wetlands adjacent to navigable waters is not "unreasonable" so long as the "adjacent wetlands [] are inseparably bound up with the 'waters' of the United States." *Id.* at 134, 135. The Court relied on the Corps' conclusion that adjacent wetlands "tend to drain into" abutting navigable waters and that they therefore may influence the water quality of those adjacent waters. *Id.* at 134. Thus, the Court concluded that the Corps'

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[2] The property at issue in *Riverside Bayview* contained a wetland "characterized by saturated soil conditions and wetland vegetation [that] extended . . . to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131. Based on these hydrologic characteristics and the location of the disputed area, the Court found that the wetland was "adjacent to a navigable waterway" and therefore "is part of the 'waters of the United States' as defined by" Corps regulations. *Id.*

interpretation that "waters of the United States" extended to those adjacent wetlands was a "permissible" construction of the statute. *Id.* at 135.

Following *Riverside Bayview*, the Corps increasingly stretched its jurisdiction to reach non-navigable "waters" of the United States. By 1986, without any additional grant of authority from Congress, the Corps had repeatedly expanded its definition of "waters of the United States" to include not only navigable waters and adjacent wetlands but also: "all other waters such as intrastate . . . streams (including intermittent streams), mudflats, sandflats, [and] sloughs . . . the use, degradation or destruction of which could affect interstate or foreign commerce"; "all impoundments" of these waters; any "tributaries" of these waters; and any wetland adjacent to any of these non-navigable waters. *See* 33 C.F.R. § 328.3 (1986). Moreover, the Corps declared that this expansive definition of "waters of the United States" established the "jurisdictional limits of the authority of the [Corps] under the Clean Water Act." 33 C.F.R. § 328.1 (1986).

But the Corps did not limit its newly inflated jurisdiction to only the extensive number of faint, ephemeral rivulets trickling within each state; it also interpreted federal jurisdiction to reach isolated intrastate waters "[w]hich are or would be used as habitat by" migratory birds. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). When the Corps applied this "Migratory Bird Rule" to regulate several municipalities' activities, which would have impacted some abandoned sand and gravel pits that had filled with water, the municipalities challenged the rule, and this Court took the opportunity to curb the Corps' administrative sprawl.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"), this Court ruled that construing the definition of "waters of the United States" to encompass isolated, intrastate waters that serve as habitat for migratory birds "exceeds the authority granted to [the Corps] under § 404(a) of the CWA." The Court found that although CWA jurisdiction may extend beyond waters that are traditionally "navigable," such waters are only jurisdictional when they are "inseparably bound up with" or maintain a "significant nexus" to traditional navigable waters. *Id.* at 167, 172. "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167. Nonetheless, because *Riverside Bayview* addressed only adjacent wetlands, its holding did not apply to the remote, intrastate, non-adjacent features at issue in *SWANCC*. *Id.* (quoting *Riverside Bayview*, 474 U.S. at 131-32, n.8). The Court then explained, that "[i]n order to rule for the [Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." *Id.* at 168 (emphasis in original). The Court concluded that "the text of the statute will not allow this" and struck down the Migratory Bird Rule as an impermissible expansion of the Corps' jurisdiction to reach such remote features. *Id.*

B. The Corps Ignores the Limitations Placed on Its Authority by Continuing to Regulate Remote, Non-Jurisdictional Features.

If there was any lasting import to this Court's insistence on a significant nexus or an inseparable tie between navigable waters and non-navigable intrastate features, the regulated community has not experienced it.

Despite the guidance over Section 404 jurisdiction provided in *Riverside Bayview* and *SWANCC*, the Corps has disregarded these decisions.[3] Although the Corps recognizes that *SWANCC* "has affected the scope of federal jurisdiction under the CWA" and that the decision has "important implications for the scope of waters protected by the section 404 program, as well as implications for other Clean Water Act programs whose jurisdiction depends upon the meaning of 'navigable waters,'" the agency refuses to update its regulations to reflect the proper jurisdiction this Court delineated in *SWANCC*. *Hearing on Inconsistent Regulation of Wetlands and Other Waters: Before the Subcomm. on Water Res. and Env't, House Comm. on Transp. and Infrastructure*, 108th Cong. 4-5, 11 (2004) (statement of John Paul Woodley, Jr., Assistant Sec'y of the Army for Civil Works, & Benjamin H. Grumbles, Acting Assistant Adm'r for Water, EPA). Rather than adopting valid administrative regulations clarifying the proper scope of federal CWA jurisdiction under Section 404, the Corps issued a non-binding internal guidance document calling on its district offices to maintain the *status quo*. *See* Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United

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[3] The Corps is not alone in reading the "significant nexus" test out of *SWANCC*. Certain federal circuit and district courts have joined the Corps in circumventing the import of the decision. *See, e.g., United States v. Deaton*, 332 F.3d 698, 702, 707, 712 (4th Cir. 2003) (upholding assertion of federal jurisdiction over intrastate, non-navigable roadside ditches and nearby wetlands because "[a]ny pollutant or fill material" entering those remote, ephemeral features could possibly travel to and affect navigable waters seven miles away).

States," 69 Fed. Reg. 1991 app. A, at 1996-98, n.1 (Jan. 15, 2003) ("Joint Memorandum").

The Corps' non-binding guidance strips the substance from *SWANCC*. While cautioning the districts to avoid relying solely on the Migratory Bird Rule when expanding jurisdiction to isolated intrastate waters, the guidance openly advocates for the continued assertion of jurisdiction over the same suite of hydrologic features that were alleged to fall under the Corps' jurisdiction *prior* to *SWANCC*. *Id.* As support for preserving federal jurisdiction over virtually every remote, intrastate, non-adjacent hydrologic feature in the nation, the Corps falls back on *Riverside Bayview* and pretends *SWANCC* never happened. *Id.* at 1997, 1998. Although a unanimous Court in *Riverside Bayview* emphasized that its analysis applied only to wetlands adjacent to navigable waters – a fact which even the Corps has conceded – the Corps responded to *SWANCC* by hastily issuing its guidance emasculating the Court's latest assessment of the CWA and reconstruing the import of *Riverside Bayview*. This guidance claims that "the reasoning in *Riverside* . . . supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters" and authorizes the assertion of federal jurisdiction over "all interstate waters, and all tributaries to navigable or interstate waters, *upstream to the highest reaches of the tributary systems*, and over all wetlands adjacent to *any and all* of those waters." *Id.* at 1997; Memorandum from Gary S. Guzy, General Counsel, EPA, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters 5, n.7, 6 (Jan. 19, 2001) (emphasis added).

In other words, federal jurisdiction remains virtually limitless, encompassing the most remote manmade ditch,

the most ephemeral swale, the most obscure depression. The Corps has not adapted its practices to square with this Court's jurisprudence, but rather, it has adapted this Court's jurisprudence to square with its practices.

C. The Corps' Post-*SWANCC* Administration of the Section 404 Program Is Replete with Examples of Unlawful Assertions of Federal Jurisdiction.

Post-*SWANCC* administrative appeals decisions from Corps district offices across the country illustrate the extent of the Corps' continued unauthorized regulation of remote, non-adjacent wetlands and distant ephemeral trenches. These appeals demonstrate that the Corps' regulation is not only excessive and irrational; it also regularly disrupts legitimate upland development and critical public infrastructure projects.[4]

Examples of such unlawful assertions of Corps jurisdiction abound. Shortly after *SWANCC* was decided,

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[4] The eight Corps division offices that oversee individual district offices within a particular region provide these administrative appeals decisions for public review on the divisions' websites. *See* Great Lakes & Ohio River Division - Table of Appeals, http://www.lrd.usace.army.mil/regulatory/appealprocess/; Mississippi Valley Division - Table of Appeals, http://www.mvd.usace.army.mil/Nwsinfo/MVD_Appeals/appeal.htm; North Atlantic Division - Table of Appeals, http://www.nad.usace.army.mil/appeals.htm; Northwestern Division - Table of Appeals, http://www.nwd.usace.army.mil/et/reg/appeals.asp; Pacific Ocean Division - Table of Appeals, http://www.pod.usace.army.mil/Regulatory/Regulatory.htm; South Atlantic Division - Table of Appeals, http://www.sad.usace.army.mil/regulatory/regulatory.htm; South Pacific Division - Table of Appeals, http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm; Southwestern Division - Table of Appeals, http://www.swd.usace.army.mil/../regulatoryappeals/index.htm.

the Corps' Los Angeles District extended federal jurisdiction to a "desert wash" simply because the property at issue was "at a higher elevation" than surrounding areas, and the District assumed that water from the wash "must flow down gradient and therefore must reach" an ephemeral drainage over 1,000 feet away, even though the District conceded that no morphological connection existed between the two features. MolyCorp Inc. Property, Los Angeles Dist. File No. 200001678-AJS at 7-9 (Aug. 16, 2001) (admin. appeal).[5]

The San Francisco District attempted to assert jurisdiction over wetlands separated from drainage channels by 250 feet of manmade uplands because the wetlands were within "reasonable proximity" of the channels to establish adjacency. Baccarat Fremont Developers, San Francisco Dist. File No. 23205S at 5 (Oct. 25, 2001) (admin. appeal). The District reasoned that site topography indicated that the wetlands *could* drain into the channels during storm events *if* the uplands had not been there to prevent such drainage. *Id.*

The Sacramento District contended that federal jurisdiction reached a small wetland area in Colorado that during large storm events periodically flowed offsite through a vegetated drainage until it reached a golf course

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[5] The same District claimed jurisdiction over another desert wash, which occasionally emptied into a manmade water retention basin, which was "drained by a 60 foot long, 6 inch diameter underground culvert," which connected to a channel that meandered through residential areas and became "indistinct at several locations ... where [it] follows or crosses paved surfaces." The District alleged that "[t]hese road crossings act as conduits of the water and maintain the tributary connection." Sunrise Office Park, Los Angeles Dist. File No. 2001-00379-RJD at 3 (Sept. 7, 2001) (admin. appeal).

fairway, crossed the grass fairway as undefined sheet flow, entered a 6 inch pipe, traveled underground for several hundred feet, then drained into a manmade roadside ditch, which meandered for over one mile before reaching a river. The Biggers Property, Sacramento Dist. File No. 200275257 at 3-4 (Dec. 19, 2003) (admin. appeal).[6]

Based on its review of a 1949 U.S. Geological Survey map, the New York District claimed jurisdiction over wetlands even though it admitted during a site visit that there was no identifiable hydrologic connection between those wetlands and unrelated onsite tributaries. Lands of David Fusco, New York Dist. File No. 2000-01007-YN at 2-4 (Dec. 5, 2003) (admin. appeal). The District nonetheless alleged that jurisdiction was proper because, according to the map, the wetlands "'*appear to be* part of a wetland complex that *was associated* with an unnamed tributary to [a named tributary]' that was 'located in the *proximity* of these wetlands.'" *Id.* at 3 (emphasis in the original).[7]

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[6] Similarly, the Baltimore District attempted to assert jurisdiction over an "ephemeral channel" that drained offsite until it reached an upland agricultural area and disappeared; the ephemeral channel was "separated from [any] jurisdictional areas by at least 600 feet of non-jurisdictional areas." Irvine Nature Center, Baltimore Dist. File No. 02-63179-4 at 1-2 (Mar. 5, 2004) (admin. appeal); *see also* Frank Attanasio, Philadelphia Dist. File No. 199900072-46 at 9 (Mar. 5, 2004) (admin. appeal) (asserting jurisdiction over wetland based on alleged historic hydrologic connection that no longer existed but explaining that "[g]iven the heavy usage of the site by children for recreational purposes, it is entirely reasonable the ditch may have been disturbed beyond recognition").

[7] Likewise, the Los Angeles District attempted to assert jurisdiction over a desert wash that, prior to 1952, may have had a hydrologic connection to another wash. Although the District conceded that any connection "disappeared some time after 1952,"

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D. The Corps' Refusal to Respect the Bounds of Federal Jurisdiction Has a Substantial and Inequitable Impact on Development.

As the above examples demonstrate, the Corps continues to exercise its jurisdiction over remote, non-navigable wetlands and distant, ephemeral trenches, usually with inexplicable and inconsistent results. The unpredictability currently tainting the Corps' jurisdictional determinations has substantial and inequitable impacts on property development and critical infrastructure improvements, which are already subject to the full panoply of state and local regulation.

Negotiating the Section 404 permitting program involves a major logistical undertaking for property owners. It requires immense expenditures of both time and capital resources. As one study recently explained, it takes applicants an average of 788 days to obtain an individual Section 404 permit. D. Sunding & D. Zilberman, *The Economics of Environmental Regulation by Licensing*, 42 Nat. Resources J. 59, 74-76 (2002). This protracted process carries an average price tag of over $271,000, not including the opportunity costs and delay-related costs accrued during the two years required to complete the process. *Id.* Nor does this average cost account for the increased financial burdens accompanying the growing regulatory uncertainty that now typifies the

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(Continued ...)
and the administrative record contained no evidence that any connection ever existed, the District deemed the wash jurisdictional based on the alleged "historical tributary connection." Valley Vista Property, Los Angeles Dist. File No. 2002-001321-SMD at 2-4 (Jan. 31, 2003) (admin. appeal).

Corps' jurisdictional determinations. *See id.* at 82. Such uncertainty requires owners to "carry capital and bear labor and other operating expenses for longer periods of time." *Id.* Consequently, they incur increased borrowing costs due to the need for additional capital and higher interest rates. *Id.*

Moreover, in the absence of suitable agency guidance defining the proper scope of the Corps' jurisdiction over non-navigable, non-adjacent wetlands and manmade trenches, the 38 Corps districts implementing Section 404 permitting have been forced to interpret the pre-*SWANCC* regulations to determine whether CWA jurisdiction extends to these remote features. *See* U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, 3-4, 17-25 (Feb. 2004). As a result, while the districts generally continue to employ the same processes and data sources as they did prior to *SWANCC* to make jurisdictional determinations ("JDs"), their interpretations of the scope of federal jurisdiction over non-navigable, non-adjacent wetlands and related ephemeral drainages vary widely, resulting in a nationwide patchwork of contradictory, often overreaching Corps practices and assertions of federal jurisdiction. *See id.* at 17-25 (discussing the districts' varying JD practices based on hydrologic connections, proximity to navigable waters, upland barriers, tributaries, and ditches); *see also* U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction*, GAO-05-870, 14-15 (Sept. 2005) (finding similar procedures among districts for conducting JDs, but noting the differing policies used for determining jurisdiction).

Given the absurdity of trying to apply the Corps' opaque post-*SWANCC* guidance, it is hardly surprising that such wide-ranging inconsistency has developed among the district offices. However, the effects of the Corps' confusion and of the resulting inconsistent practices extend far beyond the district offices.[8] It is the property owner and project manager that bear the burden of the Corps' illegitimate practices because it is impossible to predict with any reasonableness whether and to what degree a particular district will extend jurisdiction over any remote, ephemeral features that could be impacted by onsite activity.[9] The Corps' informal guidance further exacerbates the confusion by instructing each district office to conform JDs to subsequent federal court

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[8] The muddled application of CWA jurisdiction among the district offices has produced a similarly muddled application of CWA jurisdiction among the federal district courts and circuit courts. *See* Joint Memorandum, *supra* at 1996-98 (summarizing the many inconsistencies among the lower federal courts). Apparently taking their cue from the Corps' distorted rendition of this Court's direction in *Riverside Bayview* and *SWANCC*, many – but not all – of the federal courts have disregarded the jurisdictional boundaries articulated in those decisions. *See* Petitioners' Carabell *et al.* Pet. for Cert. at 8-13 (surveying various federal court opinions addressing the Corps' jurisdiction).

[9] Courts have found that, in addition to landowners, contractors and consultants are also liable for discharging pollutants without a permit. *See United States v. Bd. of Trs. of Fla. Keys Comm. Coll.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (finding both the landowner *and* the contractor liable, where the contractor was responsible for discharge but the owner was responsible for obtaining CWA permits); *see also United States v. Weisman*, 489 F. Supp. 1331, 1333-34 (M.D. Fla. 1980) (holding liable a consultant who designed a road project, applied for a Section 404 permit, and communicated with the Corps about the project but did not order discharge activity and was not present when the discharge occurred).

decisions concerning the scope of jurisdiction within the respective district. Joint Memorandum, *supra* at 1998. This policy, when applied to the districts' already divergent interpretations of their jurisdiction over non-navigable, non-adjacent features, has created a self-sustaining cycle of JDs made by a district, leading to federal court review of the asserted jurisdiction, leading to revised interpretations of CWA jurisdiction within the district. *See id.* at 1996-98 (detailing the many inconsistent judicial interpretations of federal jurisdiction over remote features).

Without the benefit of consistent and proper JDs for true interstate, adjacent features, citizens must incur the additional costs of the Section 404 program, regardless of whether there are actually jurisdictional features located on a development site or not. In light of the grueling consequences *amici* firms and other citizens face if they unsuccessfully attempt to divine a district office's rendition of federal jurisdiction, they are left with little choice but to submit to the Section 404 process and incur the delays and high costs (not to mention the uncertainty) that accompany it.[10]

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[10] The Clean Water Act carries strict civil liability provisions, under which violations are punishable with daily fines topping $32,500 each. 33 U.S.C. § 1319(d); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7125 (Feb. 13, 2004). The statute also imposes severe criminal penalties for violations, including prison terms of one to six years and fines of up to $100,000 per day. 33 U.S.C. § 1319(c).

II. EXTENDING FEDERAL JURISDICTION TO REMOTE, INTRASTATE, NON-ADJACENT FEATURES IS INCONGRUENT WITH ACHIEVING THE CLEAN WATER ACT'S GOALS.

Despite the Corps' continued assertion of federal jurisdiction over remote, intrastate, non-adjacent wetlands and drainages following *SWANCC*, these features do not fall within the ambit of federal authority. Manmade ephemeral trenches are neither wetlands nor waters. And while the wetland features may satisfy the regulatory criteria for "wetlands" as defined by the Corps, they lack the capacity to influence the integrity of navigable waters, even when connected to an ephemeral drainage. As a result, these features do not factor into the legislative design of the CWA and are not subject to federal regulation.

A. Congress Designed the Clean Water Act to Regulate Discharges That Impact the Integrity of Navigable Waters.

Congress designed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the legislature set a national goal of eliminating "the discharge of pollutants into the navigable waters." *Id.* § 1251(a)(1). Significantly, Congress also expressed the concomitant goal "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." *Id.* § 1251(b). These two goals, together with the Section 404 permitting program for the "discharge of dredged or fill material into the navigable waters," provide the framework on which this Court relies to evaluate the

proper scope of federal jurisdiction over non-navigable hydrologic features. *See, e.g., Riverside Bayview*, 474 U.S. at 132-33 (evaluating the Corps' authority over adjacent wetlands "in light of the language, policies, and legislative history of the Act").

Applying this framework, this Court recognizes that the federal government's Section 404 authority encompasses truly "navigable waters," and that this authority derives from Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See SWANCC*, 531 U.S. at 172. The Court also found that this analytical framework justifies extending the Corps' authority to certain wetlands adjacent to navigable waters if these features "play a key role in protecting and enhancing water quality" and are therefore "inseparably bound up" with the navigable waterways that the CWA aims to protect. *Riverside Bayview*, 474 U.S. at 133-35. Conversely, the Corps was prohibited from stretching its reach to regulate intrastate, non-navigable, non-adjacent features inhabited by migratory birds because these features lack a "significant nexus" to, or are not "inseparably bound up with," navigable waters. *See SWANCC*, 531 U.S. at 167-68.

As observed in *Riverside Bayview* and *SWANCC*, adjacency may engender a significant nexus between non-navigable features and navigable waters because it may allow the features to have an external, offsite influence by functioning "as integral parts of the aquatic environment." *Id.*; *Riverside Bayview*, 474 U.S. at 134, 135. Among the external effects the Court highlighted as integral to the aquatic environment were the capacity "to filter and purify water" discharging into navigable waters and the capacity "to slow the flow of surface runoff . . . and thus prevent

flooding and erosion." *Riverside Bayview*, 474 U.S. at 134. By performing these ecological functions, certain adjacent wetlands may contribute to achieving the legislative goal of preserving and maintaining the integrity of navigable waters.

B. Because Remote, Intrastate, Non-Adjacent Wetlands Lack the Capacity to Influence Navigable Waters, They Are Not Subject to Federal Jurisdiction.

Not every wetland is an adjacent wetland. In fact, a great number of wetlands are not. Based solely on the ecological functions highlighted in *Riverside Bayview*, adjacent wetlands may exhibit a significant nexus with navigable waters, which could confer federal jurisdiction over the features. Yet, adjacent wetlands are but one of many distinct classes of hydrologic features that fall under the rubric of "wetlands."[11] This legal term simply signifies that a feature exhibits the three morphological attributes that separate wetlands from uplands—hydrology, hydric soils, and hydrophytic vegetation. 33 C.F.R. § 328.3(b); William J. Mitsch & James G. Gosselink, *Wetlands* 584-87 (3d ed. 2000). Consequently, the only absolute among the various classes of wetlands is that they all exhibit these three criteria. But these criteria merely describe what a wetland *is*, not what a wetland *does*.

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[11] The Corps defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b).

Wetland physiology, the functional aspect of wetlands, is determined by a combination of external factors. Theda Braddock, *Wetlands: An Introduction to Ecology, the Law, and Permitting* 12 (1995). The scientific community has "increasingly recognized that the factors controlling the existence of a wetland as well as its functions and values are largely determined by landscape characteristics and the wetland's position in the landscape." *Id.* at 24; *see also* Mark S. Dennison & James F. Berry, *Wetlands: Guide to Science, Law, and Technology* 61-65 (1993) (explaining that wetland function depends on a variety of factors, including wetland type, location, and hydrology). These external factors interact in various manners, creating different classes of wetlands with unique functional capacities. *See generally* Dennison & Berry, *supra,* at 74-145 (describing different characteristics and functions of fourteen separate wetland classes). Because wetland function correlates directly to the effects of each wetland on the outside environment, and each wetland class represents a unique functional scheme, it is understandable that the different classes of wetlands influence the outside environment in different ways. *See* Braddock, *supra*, at 12.

As this Court recognized in *Riverside Bayview* and *SWANCC*, it is this external influence, specifically the influence on navigable waters, that confers federal jurisdiction over non-navigable hydrologic features. *Riverside Bayview*, 474 U.S. at 134-35; *SWANCC*, 531 U.S. at 167-68. Due to their external influence, some of these features may contribute to achieving Congress' goal of restoring and maintaining the chemical, physical, and biological integrity of navigable waters. *Riverside Bayview*, 474 U.S. at 134-35. But features lacking the functional capacity to influence the integrity of navigable

waters are incapable of furthering Congress' goal. *See SWANCC*, 531 U.S. at 167-68.

1. *The Features at Issue Are Intrastate, Non-Adjacent Wetlands and Trenches Far Removed from Any Navigable Water.*

The intrastate, remote wetlands and ephemeral trenches at issue here are not adjacent to navigable waters. Nor are they even close to any navigable waters. These features do not perform the functions that the Corps so often relies on to justify its expansion of federal jurisdiction over other non-navigable features. Unlike wetlands adjacent to navigable waters, these wetlands are normally groundwater and direct precipitation-dependent. *See* Dennison & Berry, *supra* at 87-123 (distinguishing hydrologic sources for classes of adjacent wetlands from hydrologic sources for classes of non-adjacent wetlands). Their hydrology is primarily a product of proximity to the underlying water table and regional climate, rather than as a receiving body for up-gradient surface water discharges, floodwater spillover, or backwater flooding. *Id.*

The most that may be said of these remote, intrastate wetlands and ephemeral trenches is that they possibly bear a tangential affiliation to some distant navigable waters. However, this affiliation arises only if any water happens to seep out of these wetlands, which generally lack fixed outlets, traverse a labyrinth of manmade trenches or other ephemeral and intermittent drainages, which are normally dry, and eventually find its way to a navigable water. Neither Congress nor any landowner would have conceived that such property is somehow federalized.

While admittedly, if there is in fact a faint "connection" between the distant wetlands and an offsite

manmade trench or other ephemeral seep, as Respondents claim, the features could provide some minor, localized ecological function. *See* Paul D. Cylinder, *et al.*, *Wetlands, Streams, and Other Waters* 10 (2004) (explaining that ecological function of down gradient drainages "is highly dependent" on external inputs). But such function, even in the aggregate, hardly occurs with the frequency, duration, or scale required to maintain a "significant nexus" or inseparable tie with distant navigable waters. *See Riverside Bayview*, 474 U.S. at 133-35; *SWANCC*, 531 U.S. at 167-68. Put simply, any functions of these solitary, intrastate features over which the Corps claims to maintain jurisdiction are far too remote, localized, and infrequent to fall within the federal government's authority.

2. *Remote, Non-Adjacent Features Lack the Capacity to Mitigate Flooding and Erosion in Navigable Waters.*

An examination of the scientific evidence indicates that, consistent with this Court's observation in *Riverside Bayview*, certain adjacent wetlands may help to reduce the impacts of flooding and erosion in abutting navigable waters by receiving floodwater overflow from these waters and intercepting and retaining surface water discharges before they enter navigable waters. Braddock, *supra*, at 12; Dennison & Berry, *supra* at 63. In this way, adjacent wetlands can mitigate the damage a flood causes. This function is largely a product of their position in the landscape on floodplains and in bottomlands, which allows those wetlands to "store and attenuate flood waters when streams or rivers overflow their banks." *See* Braddock, *supra* at 13. By storing floodwater overflow and surface water discharges, these wetlands may also dissipate the energy of floods and decrease the impacts of

downstream bank erosion in the flooding navigable waterway. Dennison & Berry, *supra* at 63-65. But *Carabell* and *Rapanos* bear no relationship to such circumstances.

From an ecological perspective, the remote wetlands and ephemeral trenches at issue here are in no way analogous to the wetlands adjacent to navigable waters in *Riverside Bayview*. Remote, intrastate wetlands play an extremely minor and localized role in flood mitigation, if they play any role at all. *See* Braddock, *supra*, at 13 (attributing the function of flood attenuation to floodplain and bottomland features). Because these non-adjacent features are not located in a floodplain of any sort, they are incapable of reducing flooding by receiving water that overtops the banks of rivers and streams, the primary mechanism of flood abatement. Dennis W. Magee, *A Primer on Wetland Ecology*, in *Wetlands Law and Policy* 44-45, 47-48 (2005); Mitsch & Gosselink, *supra*, at 584-87. Any capacity to reduce flooding in navigable waters derives from their capacity "to intercept storm runoff and to store storm waters, thereby changing sharp runoff peaks to slower discharges over longer periods of time." Mitsch & Gosselink, *supra*, at 584.

Despite the Corps' claim to the contrary, there is no indication that these wetlands perform these functions in any consequential way, particularly when their only external outlet is through manmade trenches and other ephemeral seeps. *See id.* at 126-33 (noting while some wetlands act as "water flow regulators for downstream rivers," others "have surface outflows that develop only when their water stages exceed a critical level"). As noted, these wetlands are often groundwater-driven and direct precipitation-dependent systems. Many of these features never, or only rarely, contain aboveground water

and their only external outlet is an ephemeral, manmade trench or drainage—hardly indicative of being inundated by or storing significant amounts of surface water runoff or storm water flow. Robert J. Pierce, Ph.D., PWS, CWD, Wetland Science Applications, Inc., Technical Principles Related To Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act 35-40, 60-61 (2003), http://www. wetlandtraining.com/BobRept.pdf.

The location of adjacent wetlands within floodplains and bottomlands also allows them to serve as buffers that separate surface runoff sources from navigable waterways. *See* Dennison & Berry, *supra*, at 65. By acting as buffers, adjacent wetlands may decrease runoff velocity of surface water flow before it is discharged. *Id.* This function dissipates energy and reduces erosion. *Id.* at 63-65, 124. But remote, non-adjacent wetlands are not located in these areas and have an extremely limited capacity to act as buffers or to store surface water. *See id.* at 90-100, 123-25. As such, they have a limited capacity to reduce offsite erosion and resulting downstream siltation.

3. *Remote, Non-Adjacent Features Lack the Capacity to Influence Water Quality of Navigable Waters.*

Scientific studies also indicate, as this Court recognized in *Riverside Bayview*, that the particular functional scheme of adjacent wetlands may perform ecological functions that influence water quality in abutting navigable waters. *See Riverside Bayview*, 474 U.S. at 134-35. Studies have found that, under certain conditions, wetlands adjacent to navigable waters have the "capability to cleanse water through biogeochemical transformation of various pollutants, particularly nutrients." Braddock, *supra*, at 12. Due to their topographic position on floodplains and bottomlands and

at the fringes of lakes, these wetlands serve as buffers to neighboring navigable waters and help to reduce the pollutant concentration of flows entering those waters. Magee, *supra* at 40, 44-45, 47-48. Thus, certain wetlands in these locations may influence adjacent navigable waters by discharging water of a "higher quality" than the water that originally entered the wetland. *Id.* at 40-41. Again, *Carabell* and *Rapanos* bear no relationship to such circumstances.

The remote wetlands and ephemeral trenches at issue here do not normally provide this function because they are not adjacent to any navigable water. Nor do they serve as buffers to discharging surface waters. These features are simply too far removed to influence the water quality of navigable waters. Pierce, *supra* at 35-40, 60-61. In addition to their remote, non-adjacent location, the filtration capacity of these wetlands is also hampered by their lack of surface water storage capacity. Along with increasing the ability to mitigate downstream flooding, "a wetland's ability to store surface water is strongly correlated with its capacity to modify water quality by retaining, trapping, and transforming sediment and contaminants." Magee, *supra* at 43. Since remote groundwater-driven and precipitation-dependent wetlands have little surface water storage capacity, the ability of these features to influence water quality is even further limited. *See generally* Pierce, *supra* at 35-40, 60-61.

III. STATE REGULATION OF THESE REMOTE FEATURES IS NECESSARY DUE TO COMMERCE CLAUSE LIMITATIONS AND PRAGMATIC BECAUSE THE STATES ALREADY PROVIDE THIS REGULATION.

Because remote, intrastate, non-navigable, non-adjacent wetlands and ephemeral manmade trenches are

generally incapable of influencing the integrity of navigable waters, the Constitution of the United States dictates that federal regulation of these features must yield to state regulation. Otherwise, the Corps' reach is virtually infinite.

It is beyond dispute that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173. As this Court explained, there are but three "categories of activity that Congress may regulate under its commerce power": 1) the channels of interstate commerce (*i.e.*, traditional navigable waters); 2) the instrumentalities of interstate commerce, or persons and things in interstate commerce; and 3) activities that "substantially affect" interstate commerce. *SWANCC*, 531 U.S. at 192-93 (Stevens, J. dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). Federal regulation of remote, intrastate, non-navigable wetlands and ephemeral trenches is analyzed under the third category. *See id.* at 193 (analyzing in dissent the Migratory Bird Rule under the substantial effects test).

As discussed at length above, the natural and manmade features at issue here do not influence the integrity of navigable waters. The ecological incapacity of these intrastate wetlands and manmade trenches to affect the channels of interstate commerce indicates that they are also incapable, even in the aggregate, of substantially affecting such commerce. Consequently, these distant and faint features cannot be subject to federal jurisdiction.

Congress recognized the constitutional constraints on exercising federal authority over remote, intrastate, non-navigable features. In drafting the Clean Water Act, Congress expressly preserved the traditional authority of

the States to control intrastate uses of land and water resources and maintained "the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). As explained in *SWANCC*, inflating the scope of federal authority to reach property that has only limited and localized ecological functions, if any, violates the express legislative intent of the CWA and marks "a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Congress intended the States to regulate these remote features, and the States have honored this intention.

The States can, and do, regulate the features at issue here. In fact, already 47 States have adopted statutory or regulatory programs that offer protection for intrastate wetlands and waters. *See* Jeanne M. Christie, State Wetland Programs (2005), http://www.aswm.org/swp/statemainpage9.htm; Paul D. Cylinder, *et al.*, *supra* at 101-13 (describing the water resource programs in each state).[12] These programs have been remarkably successful at conserving remote, intrastate freshwater wetlands, coastal wetlands, and ephemeral features not subject to the Corps' jurisdiction. *See id.* at 99-100, 116-23 (detailing accomplishments of programs in California, Florida, Massachusetts, Michigan, New Jersey, and Washington); *see also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (discussing wetland protections under Rhode Island law in a takings challenge).

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[12] In the interest of brevity, the state statutory and regulatory programs that offer protection of these intrastate features have not been individually listed here. The cited sources describe each state's programs in detail.

Such comprehensive state regulation renders the Corps' illegitimate assertions of federal jurisdiction unnecessary and duplicative. The Corps' intrusive practices only serve to confound effective state programs, not to mention legitimate land development and public infrastructure improvements already subject to rigorous state and local environmental and land use regulation.

CONCLUSION

The *amici* International Council of Shopping Centers, *et al.* respectfully request that this Court reverse the Sixth Circuit's rulings in *Rapanos* and *Carabell* upholding the extension of federal Clean Water Act jurisdiction over non-adjacent, non-navigable wetlands and drainages.

Respectfully submitted,

Gus Bauman
(Counsel of Record)
Fred R. Wagner
W. Parker Moore
Beveridge &
Diamond, P.C.
1350 I St, NW, Suite 700
Washington, DC 20005
(202) 789-6000

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In The
Supreme Court of the United States

JUNE CARABELL, ET AL.,

Petitioners,

v.

ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF CALVIN H. JOHNSON, PRO SE, IN SUPPORT OF RESPONDENTS

CALVIN H. JOHNSON
Amicus Curiae, pro se
727 East Dean Keeton Street
Austin, Texas 76705
(512) 232-1306

QUESTION PRESENTED BY AMICUS CURIAE

Does the United States Army Corps of Engineers have the constitutional power to protect wetlands and clean water under the power "to provide for . . . the general Welfare" given by Article I, section 8, clause 1 of the Constitution or must preservation of wetlands and clean water be within the power to suppress and channel "commerce" in section 8, clause 3?

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INTEREST OF AMICUS CURIAE

Calvin Johnson is a law professor at the University of Texas School of Law with an academic interest in the outcome of this case.[1] His resume and list of publications can be found at http://www.utexas.edu/law/faculty/cvs/chj7107_cv.pdf. He has written RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (Cambridge University 2005), which is a history of the Constitution in terms of what the Founders intended to accomplish. He offers this brief as *amicus curiae* in order to help preserve the wetlands of America and keep clean water for the future of America. He has no financial stake in the outcome of this case.

The attached *amicus curiae* brief supports the respondent, U.S. Army Corps of Engineers and respondent, United States. This brief is filed by consent of the parties. Petitioners, June Carabell and John Rapanos have filed blanket consents to *amici* briefs with the court.[2] By letter of December 19, 2005 to me, the Solicitor General consented to this brief on behalf of respondents.

SUMMARY OF ARGUMENT

Those who use originalism as a means to restrain the federal government should understand that original intent of the Constitution was to create a powerful national government able to reign over and rein in the states. There is almost no states rights in the original Constitution: the

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[1] Pursuant to Rule 37.6, I affirm that this brief was authored in full by named counsel and no one but named counsel has made a monetary contribution to the preparation or submission of the brief, except that I will apply for reimbursement of costs from funds of my employer law school dedicated to support of my academic writing without regard to content. My colleague, Douglas Laycock, made helpful comments to the brief. The views of this brief are my personal conclusions and cannot be attributed to my reviewer or to my employer, University of Texas.

[2] http://www.supremecourtus.gov/docket/04-1034.htm; http://www.supremecourtus.gov/docket/04-1384.htm.

anti-national interpretations became established only after Jefferson's election in what he rightfully called the Revolution of 1800. A return to a purified understanding of the original Constitution would be unkind to Anti-Federalism.

Congress is constitutionally empowered to protect wetlands and clean water under the power given to provide for the general welfare, as determined by sovereign Congress by vote of its elected officials through the political process. The frontiers of federal power are not here determined by the power to regulate commerce.

Article I, section 8, clause 1 of the Constitution gives the federal government the power to provide for "the common Defence and general Welfare" and clause 18, the necessary and proper clause, then allows Congress to provide for the general welfare by regulation or other means. The wording is a fair rendering of the binding Resolution of the constitutional convention, using the phrase "common Defence and general Welfare," brought over from the Articles of Confederation in order to maintain continuity. The binding Resolution provided that Congress would have all of the powers it had under the Articles of Confederation, plus the power to "legislate for the common interests of the Union." Whether a power is within the general welfare is determined by Congress, and by the political competition between Congress and the states for loyalty of the people. Congress by enactment of the Clean Water Act has determined that the protection of wetlands and clean water is for the general welfare.

The powers listed in clauses 2 through 17 of Article I, section 8 are illustrative rather than exhaustive. The Framers deleted the limitation found in Article II of the Articles of Confederation, which provided that Congress could have only the powers *expressly* delegated to it, because the limitation had proved "destructive to the Union" and even the passport system had been challenged. The federal peacetime passport is not an enumerated power, nor strictly necessary to any enumerated power, but it is within the federal power because it is for the

common defense or general welfare. The Convention and the Congress defeated several attempts to limit Congress to expressly enumerated powers. Section 8 lists activities that Congress can undertake for the common defense and general welfare, but the list is not exhaustive.

"Regulation of commerce" in clause 3 of section 8 was written to allow a series of mercantilist programs to restrict imports via deep water shipping, to give monopoly franchise to domestic shippers and to punish foreign shippers. The real original meaning of "regulation of commerce" is not strictly speaking helpful to any problem in the 21st Century.

ARGUMENT

I. Congress is empowered to protect wetlands and water by power to provide for the general welfare

The Constitution as written gives the federal government the power to provide for the common defense and general welfare by regulation or other means. Article I, section 8 clause 1, the tax clause, gives Congress the power to provide for the common defense and general welfare by taxation. Clause 18 then gives the Congress the power to enact any legislation necessary and proper to the accomplishment of the common defense and general welfare. "Common defense and general welfare" is the general standard describing the appropriate national sphere and the powers listed in clauses 1-17 of section 8 are illustrative, not exhaustive of the federal powers.

Reading the Constitution to give Congress the powers over the general welfare is consistent with our national values. We need, for example, to have the federal government with national powers when we face a nationwide epidemic of bird flu, or Ebola or some even worse new disease. We need to rein in pollution on the national level, in those cases in which states or localities decide to pollute their neighbors for self-serving reasons. Some decisions get worse when they are balkanized because balkanization

separates the beneficiaries and bearers of any cost. We should not need to find that either bird flu or pollution is some kind of "commerce." "Common Defence and general Welfare" explains the scope of the federal government that our values in fact endorse.

A. Original Intent of the Written Constitution

An accurate understanding of the original intent of the Constitution does not confine the federal government within a narrow corral. Congress has the sweeping power to provide for the general welfare and common defense.

1. The Constitutional language "to provide for the general welfare" is synonymous with the binding Resolution allowing Congress to legislate in *all* cases for the general interest

The language of the Constitution, giving authority to provide for the general welfare, was written to be a synonym for the binding Resolution adopted by the Philadelphia Constitutional Convention of 1787. The binding Resolution of the Convention included a motion offered by Gunning Bedford of Delaware on July 17, 1787 to allow Congress further "to legislate *in all Cases* for the general Interests of the Union."[3] The full scope of the federal power in the Resolution, as augmented by the Bedford's motion, was that

> "the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate *in all Cases* for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony

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[3] Gunning Bedford, *Motion of July 17, 1787*, 2 FARRAND'S RECORDS 26 (emphasis added).

> of the United States may be interrupted by the Exercise of individual Legislation Resolution."[4]

The language of the Constitution was drafted by a series of committees, which were instructed to draft language "conformable to the Resolutions passed by the Convention."[5] The drafting committees were not to effect policy, Washington wrote, but to "arrange, and draw into method & form the several matters which had been agreed to by the Convention."[6] The role of the drafting committees was simply to ensure that the Constitution was "properly dressed."[7] The first drafting committee was called the "Committee of *Detail*," denominating that its authorization was confined to details. The final drafting committee was called the "Committee on *Style*" denominating that it could not get into substance. The drafting committees were loyal to their mandate to dress the binding resolutions for the public, as indicated for instance by the fact that there were no whelps, no barking dog, and no protests that the drafting committees had breached their scriveners' duties.

The Committee on *Detail*, the first of the drafting committees, used the Articles of Confederation as a model, but deleted the "expressly delegated" limitation on Congress' powers. Article II of the Articles of Confederation had provided that the Congress would have only those powers *expressly* delegated to it. The committee took out the limitation. As Governor Edmund Randolph (Va.) explained to the Virginia Ratification Convention, the expressly delegated limitation had proved "destructive to the Union" and that *even the passport system had been*

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[4] Convention Resolutions Presented to the Committee of Detail (July 23, 1787), *in* 2 FARRAND'S RECORDS 131-32 (emphasis added).

[5] July 24, 1787, *in* 2 FARRAND'S RECORDS 106.

[6] George Washington, *Diary* (July 27, 1787), *in* 3 FARRAND'S RECORDS 65.

[7] Letter from Hugh Williamson to James Iredell (July 22, 1787), *in* 3 FARRAND'S RECORDS 61.

challenged.[8] Randolph's statement has a special weight because it was a declaration against interest and was not the kind of the understatement spin on the Constitution's impact that the Federalists sometimes used to secure ratification. Randolph had also been on the five-man Committee on Detail that took out the expressly delegated limitation.[9]

There had been a then recent controversy over the federal passport. In 1783 Pennsylvanians acting under state law authorizing captures seized the British ship *Amazon* that was carrying food and clothing for Hessian and British prisoners of war at Lancaster, Pennsylvania. Congress protested that the *Amazon* was passing under General Washington's valid passport. Eventually a committee of the Pennsylvania legislature, with advice from the Pennsylvania Supreme Court, declared that the supremacy of the federal passport rendered the Pennsylvania capture statute unconstitutional as applied to the case.[10] Federal law was supreme. The Framers intended to

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[8] Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES 600-601.

[9] *See* 2 FARRAND'S RECORDS 97 (Randolph on five man Committee on Detail).

[10] *See, e.g.*, Letter of Oliver Wolcott to Matthew Griswold, Jan. 22, 1783, 18 LETTERS OF DELEGATES at 601 (saying that if Pennsylvania law allows such an atrocious violation of the principles of the confederation, no one would trust the passport); John Dickinson, Report to the Pennsylvania General Assembly (Jan. 20, 1783), *in* MINUTES OF THE FIRST SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 783 (reporting the conflict between the passport and Pennsylvania law); Debate in Continental Congress (Feb. 20, 1783), *in* 25 JCC 906, n. 1 ("The Legislature in consequence having declared the law under which the goods were seized to be void as contradictory to the federal Constitution."); Elias Boudinot (New Jersey), *Speech to the House of Representatives* (Feb. 4, 1791), *in* 1 ANNALS 1975-1976, 1st Cong., 3d Sess. (reporting that Pennsylvania judges declared the confiscation invalid because Congress was given the power over passports); James Madison, Notes of the Continental Congress Debates (Feb. 25, 1783), *in* 19 LETTERS OF DELEGATES 68 (reporting that Madison had been told that Pennsylvania legislature

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ratify that solution. The peacetime passport is not a power enumerated in section 8 nor necessary to any enumerated power, but section 8 gives Congress that power by implication. The deletion of "expressly delegated" accomplishes and the general power to provide for the common defense and general welfare accomplishes that result.

The phrase "to provide for the common Defence and general Welfare" in section 8 comes from Article VIII of the Articles of Confederation. The phrase was added to the Constitution on September 4, very late in the Convention, by a committee of Eleven, chaired by David Brearly of New Jersey, *after* the rest of the enumerated powers of what became clause 2-18 was already in place.[11] The phrase took the place of the term, "necessities of the Union," in Randolph's first draft presented to the Committee of Detail.[12] "General welfare" is also a synonym for *exigencies of the Union* from the Annapolis Convention resolution that had empowered the Federal Convention.[13] Moreover, the Confederation Congress had empowered the Convention to propose such changes as would render the federal government "adequate to the *exigencies of Government* and the preservation of the Union."[14] The constitutional language, "to provide for the common Defence and general Welfare" is also a synonym for the binding Bedford Resolution that Congress would have the power "to legislate in all cases for the *general interests of the Union*." Use of the phrase "common defense and general welfare" from old Article VIII instead of the alternative synonyms was wise statesmanship because it maintained a continuity with the Articles of Confederation. Continuity showed that the Framers were building onto the existing federal-level

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had settled the business by deciding that Pennsylvania law was unconstitutional insofar as it interfered with passports).

[11] (Sept. 4, 1787) 2 FARRAND'S RECORDS 497.

[12] 2 FARRAND'S RECORDS 142 (emphasis added).

[13] Report of the Commissioners assembled at Annapolis Convention, 31 JCC 680 (Sept. 20, 1786).

[14] Resolution of Congress, 32 JCC 74 (Feb. 21, 1787).

government. They were not so radical as to tear out the existing fabric of government.

2. No distinction was allowed between tax and regulation.

The great goal "to provide for the common defense and general welfare" is stated within clause one of section 8, commonly called the tax and spend clause, but in the writing and in the original intent, accomplishment of the great goal is not limited to the instrumentalities of tax and spending. Once taxation is allowed for the common defense and general welfare, then the sweeping eighteenth clause allows Congress to enact "all Laws necessary and proper" to the "common Defence and general Welfare."[15] "Let the end be . . . within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[16] Once it is granted that taxation is allowed for the general welfare, pursuit of the general welfare by any other instruments follows as a matter of course.[17]

The Founders would not have denied regulation to the federal government once taxation was allowed. Regulation was considered a lesser-included power that the federal government would exercise once it commanded the paramount power of taxation. If the people will trust the

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[15] U.S. CONST. art. I, § 8, cl. 1 & 18.

[16] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.).

[17] In 1830 Madison feared that the necessary and proper clause would transform the taxation clause into a justification for achieving the common defense and general welfare by any instrument. James Madison, Memorandum not used in the letter of November 27, 1830, to Andrew Stevenson, *in* 2 THE FOUNDERS' CONSTITUTION 456, 458. Madison dreaded that interpretation, but he could see no viable stopping point once taxation was allowed for the common defense and general welfare. The interpretation that Madison dreaded in 1830 is in fact faithful to the text, to our values, and to our practices.

Congress on matters of money and revenue, Roger Sherman told the Convention, "they will trust [it] with any other necessary powers."[18] James Monroe wrote in the period before the Convention that the federal government should of course have the power to regulate commerce, but that the federal government should not get the revenue from the taxes on commerce unless the states specifically ceded that revenue.[19] From the Anti-Federalist side, taxation was the feared power of government, and "regulation" would be swept into the federal power if taxation were allowed. If Congress were granted the paramount power to tax, Anti-Federalist "Brutus" wrote, Congress would draw all other powers after it.[20] The "celebrated Montesquieu establishes it as a maxim," Centinel said, "that legislation necessarily follows the power of taxation."[21] Anti-Federalists also said that the "common Defence and general Welfare" language of clause 1 of section 8 allowed the federal legislature to "pass any law which they may think proper"[22] and to have "power co-extensive with every possible object of human legislation."[23] The "line of distinction between the power of regulating trade and

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[18] Roger Sherman, *Speech to the Federal Convention* (June 20, 1787), *in* 1 FARRAND'S RECORDS 342.

[19] Letter of James Monroe to Thomas Jefferson (Dec. 14, 1784), 22 LETTERS OF THE DELEGATES 72 (saying that Congress will distinguish between taxation and regulation of commerce, "the former unless ceded by the State to go to the State"); *see also* Letter of Charles Thomson (Pennsylvania) to John Dickinson (Dec. 25, 1780), 16 LETTERS OF THE DELEGATES 492 (disapproving of taxes for revenue, but approving of taxes "on foreign articles of luxury which we can well do without" as a "regulation of trade").

[20] Brutus I, NEW YORK J. (Oct. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 415.

[21] Centinel [Samuel Bryan] I, PHILADELPHIA INDEPENDENT GAZETTEER (Oct. 5, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 53, 57.

[22] John Williams, Debate in the New York Ratification Convention (June 26, 1787), *in* 2 ELLIOT'S DEBATES 330; *see also id.* at 338.

[23] Letter from Richard Henry Lee to Gov. Edmund Randolph, PETERSBURG VIRGINIA GAZETTE (Dec. 6, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 368.

that of drawing revenue from it" Madison explained to Jefferson, "was found on fair discussion, to be absolutely undefinable."[24]

The debaters also commonly switched the words as if "regulation" and "taxation" were near synonyms.[25] Taxation was sometimes a power within the power to regulate[26] and regulation was sometimes a subset of the power to

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[24] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS 211.

[25] Nathaniel Gorham, Speech before the Federal Convention (July 23, 1787), *in* 2 FARRAND'S RECORDS 90 (calling New York state's tax on imports through New York harbor a "regulation of her trade"); THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 17, 1787) (calling state taxes on imports "opportunities, which some States would have of rendering others tributary to them, by *commercial regulations*."); THE FEDERALIST NO. 12, at 78 (Hamilton) (Nov. 27, 1787) (espoused a federal tax on "ardent spirits," and calling it a "federal regulation"); Rawlins Lowndes, Debate in the South Carolina Legislature (Jan. 16, 1788), *in* 2 DEBATE ON THE CONSTITUTION 22 (calling a 1783 proposal to give Congress the power to tax imports a power "to regulate commerce"); Letter of John Jay, Secretary of Foreign Affairs to John Paul Jones (Oct. 6, 1787) *in* 33 JCC 636 (saying that Congress had no power to establish a "regulation" meaning a tax on seaman's wages to raise money for ransoming American seamen held captive in Algiers).

[26] Letter of Samuel Johnson to Stephen Mix Mitchell (Aug. 25, 1786) ("The Regulation of Trade is as essential a point to be obtain'd as the Impost, the former will eventually include the Latter and ought to be urged with as much pathos"), 23 LETTER OF DELEGATES 525; HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA (NOV. 8, 1787), *printed in* THE DAILY ADVERTISER (NEW YORK) (Feb. 25-27, 1788) (saying that sundry regulations of commerce will give the government power not only to collect vast revenue, but also to secure the carrying trade in the hands of citizens in preference to strangers), *reprinted in* 2 DEBATE ON THE CONSTITUTION 231; THE FEDERALIST NO. 22, at 137 (Hamilton) (Nov. 27, 1787) (arguing that if the Constitution is not ratified, the states might increase their "interfering and unneighborly" *regulations* and pointing to the German *taxes* on river commerce to illustrate the danger); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 9 MADISON WRITINGS 316, 334 (arguing that Congress may "regulate Commerce, not just to raise revenue, but also to encourage domestic manufacture").

tax.[27] The easy switches between tax and regulation may seem strange to modern ears, but they indicate that the Founders would not have drawn a legally significant line preventing federal regulation once federal tax for the same end was allowed.

3. The purpose of the Constitution was not to limit the federal government but to make it run

Removal of the "expressly delegated" limitation was also consistent with the grand purpose of the Convention that wrote it. The first purpose of the Constitution was to get the federal government revenue enough to make continuing payments on the debts of the Revolutionary War. Restoring the public credit was the overwhelming desperate need because in the next war, thought to be inevitable, the federal government would need to borrow again.[28] The Constitution is first a tax document, a pro-tax document. As James Wilson told the Convention, "It has never been a complaint against Congress that they governed overmuch. The complaint has been that they have governed too little."[29] Or as Madison had to remind Jefferson, "The evils suffered and feared from weakness in Government have turned the attention more toward the means of strengthening the [government] than of narrowing [it]."[30] The Framers removed the "expressly delegated"

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[27] Edmund Randolph, Draft of the Constitution Presented to Committee of Detail, *in* 2 FARRAND'S RECORDS 142-43 (outlining congressional "regulation of commerce" as a subdivision of the power to raise money by taxation).

[28] CALVIN JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (Cambridge 2005).

[29] James Wilson, Speech at the Federal Convention, July 14, 1787, *in* 2 FARRAND'S RECORDS 10.

[30] Letter of James Madison to Thomas Jefferson (Feb. 4, 1790) *in* 16 JEFFERSON PAPERS 146, 150; *see also* Roger Sherman & Oliver Ellsworth to Governor Samuel Huntington, *The Report of Connecticut's Delegates to the Constitutional Convention* (Sept. 26, 1787), *in* 13 DOCUMENTARY HISTORY 471 (saying that the states' principal object in

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limitation and did not replace it because limitation of the federal government was not the problem that needed to be addressed in the crisis before them.

4. The enumeration in section 8 is not exhaustive.

Reading the Constitution properly as giving a *general* power to provide for the general welfare means that the enumerated powers of clauses 2 through 17 are *illustrative* of what Congress may do within an appropriately national sphere, but are not *exhaustive*. The appropriate maxim of construction for section 8 is not the hard-edged *expressio unius est exclusio alterius exclusio* (to express one thing excludes all others), but the gentler maxim of *ejusdem generis* (of the same class or kind). *Ejusdem generis* means that unstated items covered by a general standard must be of the same class as the enumerated items, but the enumerated items are not exclusive.[21] The phrase, "to provide for the common Defence and general Welfare," in the first clause of section 8 provides the general principle that both enumerated and implied powers must satisfy.

There was a minority view within the confines of the Convention that thought that Congress should have only enumerated powers. That position was defeated, however, whenever it came up. John Rutledge of South Carolina

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authorizing the convention was to vest some *additional* powers in Congress) (emphasis added).

[21] *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188-200 (5th ed. 1992). While *ejusdem generis* cases are often ones in which the general standard follows enumerated items, it applies as well to cases in which the general standards precede the enumerated items. *Id.* at 188. *Ejusdem generis* accomplishes "the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions . . . to everything embraced in that class, though not specifically named by the particular words." National Bank of Commerce v. Estate of Ripley, 161 Mo. 126, 131, 61 S.W. 587, 588 (1901), *cited in* SINGER, *supra*, at 189.

called for an enumeration of powers early in the Convention,[32] and South Carolina voted against both the Bedford motion and the whole binding Resolution of the Convention once the Bedford motion was added, which gave Congress the power to legislate for the general interest of the union.[33] Roger Sherman spoke in favor of an enumeration[34] and Connecticut voted against the Bedford motion, but then voted for the whole binding Resolution once the Bedford motion was added.[35] A majority of the Virginia delegation voted against the Bedford motion, but then voted for the full language of the Virginia Plan as amended by the Bedford motion. The full Resolution as amended by the Bedford motion then passed by eight to two, so that the binding Resolution of the Convention gave Congress a general power to legislate for the common interests rather than a series of petty enumerated powers.[36]

When the final language was in place, Governor Edmund Randolph, a key insider, objected that "the latitude of the general powers"[37] and the "cover of general words" allowed the Congress to swallow up the states.[38] George Mason, who refused to sign the Constitution, wanted alterations so that "the object of the National Government, [would] be expressly defined, instead of indefinite power, under an arbitrary Constitution of general clauses."[39] Randolph and Mason were objecting because the claim that Congress should have only the

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[32] May 31, 1787, 1 FARRAND'S RECORDS 53.

[33] July 17, 1787, 2 FARRAND'S RECORDS 27.

[34] *Id.* at 26.

[35] *Id.* at 27.

[36] *Id.*

[37] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) *in* 10 MADISON PAPERS 205, 215.

[38] Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787) *in* 8 DOCUMENTARY HISTORY 273.

[39] George Mason, *Alterations Proposal* (Aug. 31, 1787) *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION 251 (James H. Hutson ed., 1987).

powers expressly listed lost in the writing of the Constitution.

In the Ratification debate, the proponents of the Constitution commonly described the Constitution as giving the Federal government "all Things of common foederal Concern."[40] John Jay's *Address to the People of New York*, which was described as having an "astonishing influence in converting Antifederalists"[41] and more important than the *Federalist*[42] told the people of New York that "[t]he Convention concurred in opinion with the people that a national government *competent to every national object*, was indispensably necessary."[43] Oliver Ellsworth told the Connecticut convention that the Constitution was based on "the necessity of combining our whole force, and, as to *national* purposes, becoming one state."[44]

5. General welfare is set by the political process.

Under the original understanding, moreover, what qualifies for "common defense and general welfare" would be set by the people speaking through their elected representatives and not by an unelected court. Hamilton promised the New York Convention that the division between the federal and state government was not a constitutional question. The division, he said, is

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[40] Ezra Stiles, *Diary* (Dec. 21, 1787), *in* 3 FARRAND'S RECORDS 168-69 (describing statement of delegate Alexander Baldwin).

[41] Letter from Samuel Webb to Joseph Barrell (April 27, 1788) *quoted in Editorial Note*, 17 DOCUMENTARY HISTORY 103.

[42] Editorial Note, *id.* at 101, 107; John Kaminski, *New York: The Reluctant Pillar*, *in* THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 72 (Stephen L. Schechter ed., 1985).

[43] A Citizen of New York (John Jay), *Address to the People of the State of New York* (April 15, 1787), *in* 17 DOCUMENTARY HISTORY 101, 111 (emphasis in original).

[44] Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 4, 1787) *in* 2 ELLIOT'S DEBATES 186 (emphasis added).

> "the proper business of the legislation: it would be absurd to fix it in the Constitution, both because it would be too extensive and intricate, and because alteration of circumstances must render a change of the division indispensable. Constitutions should consist only of general provisions [because] they must necessarily be permanent, and . . . cannot calculate for the possible change of things."[46]

Similarly when Madison first explained the whole Constitution to Jefferson who was in Paris as minister, he argued that the line between federal and state authority would be set by a political competition. There would be "a continual struggle between the head and the inferior members," Madison explained, "until a final victory has been gained in some instances by one, in others by the other of them."[48]

Consistently, the primary argument by *Publius* in the Federalist from *both* the Madison and Hamilton side of *Publius* is that the division between the federal and state spheres would be governed by a political competition for the loyalty of the people. *Publius* (Madison) supposed in *Federalist* No. 37 that neither the local nor the general government would entirely yield to the other, " . . . and consequently that the struggle could be terminated only by compromise"[47] and in Federalist 46 he argued similarly that the people in future will become more partial to the federal than to the State governments, only if the federal level offers "manifest and irresistible proofs of a better administration."[48] *Publius* (Hamilton) argued that the greatest dangers of encroachment came from the undue advantages that the local governments had in the competition between

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[46] Alexander Hamilton, Speech to the New York Ratification Convention, June 28, 1788 *in* 2 ELLIOT'S DEBATES 364.

[48] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS 205, 210-11.

[47] THE FEDERALIST NO. 37, at 237 (Madison) (Jan. 11, 1788).

[48] THE FEDERALIST NO. 46, at 317 (Madison) (Jan. 29, 1788).

the levels[49] and said that it would be "vague and fallible" conjecture as to where politics would set the line.[50] *Publius* is also asymmetrical. Supremacy of federal law, enforced by federal courts, would render some State acts as "absolutely and totally and repugnant" to the Constitution.[51] The states' remedy against intrusions by the federal into the state sphere is political. As the modern Supreme Court has said, "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all"[52] That skepticism about the role of a court to second guess the Congress on "general welfare" is consistent with the original intent.

B. The written Constitution does not limit Congress to "expressly delegated" powers, notwithstanding claims to the contrary.

1. There were erroneous claims that the Congress is limited to "expressly delegated" powers.

Proponents of the Constitution inconsistently and hypocritically also said that the Constitution gave only

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[49] THE FEDERALIST NO. 31, at 197-98 (Hamilton) (Jan. 1, 1788). *See also* THE FEDERALIST NO. 85, at 593-94 (Hamilton) (May 28, 1788) (saying that the greatest dangers of encroachment came from the undue advantages that the local governments had).

[50] THE FEDERALIST NO. 31, at 198 (Hamilton) (Jan. 1, 1788). *See also* James Wilson, Speech to the Pennsylvania Ratification Convention (Nov. 26, 1787), *in* 2 ELLIOT'S DEBATES 425 (arguing that the federal and the state governments should exercise prudence, candor, moderation and liberality because they are drawn from sources "equally pure"); Argument of Attorney General Edmund Randolph, Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 429 (1793) (arguing that allowing individuals to sue the state governments would not prostrate the states because the people and the state legislatures have control over the National government).

[51] THE FEDERALIST NO. 32, at 200 (Hamilton) (Jan. 2, 1788).

[52] South Dakota v. Dole, 483 U.S. 203, 208 n. 2 (1987) (Rehnquist, J.); Nevada v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989) (citing *Dole* favorably for the proposition that the "concept of welfare or the opposite is shaped by Congress").

expressed powers. Charles Pinckney misrepresented the document before the South Carolina House saying that in the federal government, "no powers could be executed, but such as were *expressly delegated.*"[53] In January 1788, Madison gave a famous version of the argument: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[54] In a speech to a crowd in front of Independence Hall, James Wilson argued that the states had plenary powers, but the federal government did not: "The congressional authority is to be collected, not from tacit implication," he said, "but from the positive grant expressed in the" proposed Constitution. The states, he argued, could have powers not mentioned in any document. For the federal government, however, "everything which is not given, is reserved."[55]

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[53] Charles Pinckney, Speech to the South Carolina House of Representatives (Jan. 16, 1788) *in* 4 ELLIOT'S DEBATES 259 (emphasis added).

[54] THE FEDERALIST No. 45, at 313 (Madison) (Jan. 26, 1788). Madison repeated the argument, in the attempt to defeat the national bank in 1791. James Madison, Debate in the House of Representatives, 1 ANNALS 1945, 1st Cong., 3d Sess. (1791) (saying that the Constitution "is not a general grant, out of which, particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands"); *see also* James Madison, *Address to the People of Virginia* (Jan. 23, 1799), *in* 6 MADISON WRITINGS 333-36:

> For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution of undefined powers.... [T]he preamble would admit a reading which would erect the will of Congress into a power in all cases, and therefore limited in none, [but] the objects for which the Constitution was formed were attainable only by a particular enumeration and specification of power granted to the Federal Government; reserving all others to the People, or to the States.

[55] James Wilson, *Speech to Public Meeting in Philadelphia* (Oct. 6, 1787), *in* 13 DOCUMENTARY HISTORY 339.

2. But there was no "expressly delegated" limit in text.

The proponents of the Constitution should not have said that Congress would have only powers expressly delegated to it because that misrepresented the document. Thomas Jefferson in Paris treated the argument that all powers were listed with disdain:

> To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed, but is surely *gratis dictim*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which declared that in express terms.[56]

The Anti-Federalists devastated the claim that the enumerated powers were exhaustive. "Let us compare Wilson's claim that all powers not granted are reserved," said a Republican in New York, "with the sense of the framers, as expressed in the instrument itself."[57] In his first essay, Brutus noted especially the absence of the "expressly delegated" limitation and concluded from its absence that "[t]his is as much one complete government as that of New York or Massachusetts [and] has as absolute and perfect powers to make and execute all laws."[58] Brutus also labeled Wilson's argument that all which is not given is reserved as "rather specious than solid." "[T]he powers granted to the general government by this

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[56] Letter from Thomas Jefferson to James Madison (Dec. 10, 1787), *in* 10 JEFFERSON PAPERS 439, 440. LATIN WORDS AND PHRASES FOR LAWYERS (B.S. Vasan ed., 1980) translates *gratis dictim* as a "voluntary statement or assertion to which a person may not be legally bound."

[57] *A Republican I: To James Wilson, Esquire*, NEW YORK J. (Oct. 25, 1787), reprinted in 13 DOCUMENTARY HISTORY 478.

[58] Brutus I, NEW YORK J. (Oct. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 414.

constitution," he said, "are complete."[59] Centinel in Philadelphia said that the Constitution did not limit Congress to powers expressly delegated by proper authority and instead made laws of Congress paramount to all State authorities.[60] "If this doctrine is true," said "A Democratic Federalist" in Pennsylvania, "it ought at least to have been clearly expressed in the plan of government."[61] Arthur Lee wrote in Virginia that "Mr. Wilson's sophism has no weight with me when he declares . . . that in this Constitution we retain all we do not give up, because I cannot observe upon what foundation he has rested this curious observation."[62]

The intentional deletion of the "expressly delegated" limitation makes it impossible to read the Constitution as if the writing limited Congress to expressly delegated powers. In our Constitution, it is the writing that binds us and not the loose lips of the proponents.

3. Loose talk does not amend the Constitution.

It should also be permissible to use arguments from the ratification debate only for the limited purpose of understanding what the Constitutional language says.

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[59] Brutus II, NEW YORK J. (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 524, 526.

[60] Centinel II, PHILADELPHIA FREEMAN'S J. (Oct. 24, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 457, 460; *see also* Cincinnatus I, *To James Wilson, Esquire*, NEW YORK J. (Nov. 1, 1787) (arguing that the Articles said at the outset that what is not expressly given is reserved, but the Constitution makes no such reservation, such that the framers of the proposed constitution presumably did not mean to subject it to the same exception), *reprinted in* 13 DOCUMENTARY HISTORY 530.

[61] A Democratic Federalist, PENNSYLVANIA HERALD (Oct. 17, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 387; *accord* An Old Whig II, PHILADELPHIA GAZETTEER (Oct. 17, 1787) (arguing that the powers were not enumerated or reserved by the Constitution and that Congress may judge what is necessary and proper in all cases) *reprinted in* 13 DOCUMENTARY HISTORY 402.

[62] Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), in 13 DOCUMENTARY HISTORY 506.

The Constitution was written in Philadelphia and once it left Philadelphia the ink was dry and the meaning of the writing was set. The ratification conventions came to adopt what amounted to a closed rule for debate on the Constitution: the conventions would recommend amendments to the first Congress, but they would not make amendments that were preconditions to ratification.[63] Thus the ratifiers were in a take-it-or-leave-it position on the Constitution without being able to influence the meaning. The unified meaning of the Constitution, the 'official idea,' was set in Philadelphia. The Philadelphia delegates argued from May to September to reach a single draft. All were bound by the written words.

After Philadelphia, however, there was never again any procedure or discipline to force a single draft or single understanding. The ratification debate extended along the entire seaboard with a population of 3 million. Reading the debates, one often wonders what document they are talking about, or at least one sees a shift on the order of "enough about you, let us talk about me." Readers in the debates commonly missed the point, or came up with interpretations that we do not find as matching the words, although that was what *they* understood to be the meaningful point to discuss. There was, as Joseph Story said, "[n]o certainty, either that different state conventions . . . gave the same interpretation to its language, or that, even in a single state convention, the same reasoning prevailed even within a majority."[64] Putting in an "expressly delegated" limitation that was not there was easy to get away

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[63] *See, e.g.*, James Madison, Speech to the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES 618-619 (arguing that every state will propose contradictory amendments and be unable to agree on them); Convention records (June 24, 1788), *in id.* at 653-55 (Virginia convention defeats Anti-Federalist motion for amendments prior to ratification).

[64] JOSEPH STORY, 1 CONSTITUTIONAL COMMENTARY 388-389 (1833). *See also* Leonard Levy, *Ratifying Intent*, ENCYCLOPEDIA OF THE CONSTITUTION: SUPPLEMENT 40 (1991) (attacking the "utter looseness" of the argument that ratifier intent governs).

with within the loosey-goosey discipline of the ratification debates. It is a written Constitution that binds us, however, and the document was written in Philadelphia. The written Constitution does not have an expressly delegated limitation because the Framers took it out.

The records of the constitutional convention were secret until long after ratification. The convention debates are not binding authority. Still, the debates clarify our understanding of the binding written Constitution. They are persuasive as to what the Constitution means because they fit the writing. By contrast, the claim in the ratification debate that Congress had only the powers expressly delegated to it does not fit the writing and is neither authority nor persuasive.

4. The Tenth Amendment: No "expressly delegated" limit.

The Tenth Amendment, which provides that the states or the people shall have the powers not delegated to Congress, allows implied or unexpressed powers for the general welfare. The Tenth Amendment is a gesture toward the Anti-Federalists' objections to deletion of the old Article II, "expressly delegated" limitation,[65] but the amendment adopted neither old Article II nor the Anti-Federalists' proposals. Anti-Federalists in Congress objected to the proposed language of the Tenth Amendment and argued that the word "expressly" needed to be inserted. The Federalists successfully opposed the insertion. Madison

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[65] *See, e.g.*, Centinel II, PHILADELPHIA FREEMAN'S J. (Oct. 24, 1787) (objecting that the Constitution had not limited Congress to powers expressly delegated by proper authority, and had made laws of Congress paramount to all State authorities) *reprinted in* 13 DOCUMENTARY HISTORY 457, 460; Cincinnatus I, *To James Wilson, Esquire*, NEW YORK J. (Nov. 1, 1787) (observing that the Articles said that what is not expressly given is reserved, but the Constitution makes no such reservation, so the presumption is that the framers of the proposed constitution did not mean to subject Congress to the same exception), *reprinted in* 13 DOCUMENTARY HISTORY 529, 530.

recounted the history of the passport, which is not enumerated, and related the debate in the Virginia ratification convention as demonstrating Anti-Federalist acquiescence there to the passport power and to the deletion of the expressly delegated limitation.[66] "The men who drew and adopted [the Tenth] amendment," Marshall later wrote, had "experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments."[67] The Tenth Amendment, accordingly, allows some unexpressed or implied powers, especially the peacetime passport.[68] The Anti-Federalists called the Amendments in the Bill of Rights, a sop or a diversion, "frothy and full of wind."[69] George Mason called them a "Farce."[70] Indeed the Tenth Amendment is a Farce, consistent with Mason's charge, because it is a symbolic truism, saying only that Congress has whatever powers that it has, whether expressed or implied.

5. "Expressly delegated" is court-made-up doctrine, not originalism.

In United States v. Hudson and Goodwin,[71] decided in 1812 the Supreme Court speaking through Jeffersonian majority, denied that there were federal common law crimes, saying that the "powers of the general Government

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[66] August 18, 1789, 1 ANNALS 790, 1st Cong., 1st Sess.

[67] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 406-07 (1819) (Marshall, J.).

[68] *See* Charles A. Lofgren, *The Origins of the Tenth Amendment*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 331 (Ronald Collins, ed. 1980) (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

[69] Aedanus Burke, Aug. 15, 1789, 1 ANNALS 774.

[70] George Mason to John Mason (July 31, 1789), *in* 3 PAPERS OF GEORGE MASON 1164.

[71] 11 U.S. 32 (1812) (Johnson, William, J). *See* Gery Rowe, *The Sound of Silence*, 101 YALE L. J. 919, 936-39 (1992); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 233-40 (2005).

are made up of concessions from the several states – what is not expressly given to the former, the latter expressly reserve."[72] *Hudson and Goodwin*'s statement of enumerated powers is hard partisan Jeffersonian ideology. As Jefferson had written the year earlier, "[t]he tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare, is almost the only landmark which now divides the federalists from the republicans."[73] With the political victory of the Jeffersonians and the demise of the Federalist party, *Hudson and Goodwin*'s statement became acceptable constitutional doctrine. In the 1819 case of *McCulloch v. Maryland*,[74] Mr. Justice Marshall, the last of the great Federalists, endorsed the doctrine of limited or enumerated power, in dicta on the way to justifying a national bank: "This government is acknowledged by all to be one of enumerated powers," Chief Justice John Marshall said, and "[t]he principle, that it can exercise only the powers granted to it, [is] now universally admitted."[75] Still, while an embattled Marshall wrote dicta accepting it, the enumerated power doctrine is hard to maintain as a matter of the writing of the Constitution or its original intent. A return to the original writing of the Constitution, and to a purified version of the original meaning, would be devastating to the doctrine that Congress has no general power to provide for the common defense and general welfare, but only powers over 17 quite petty, specifically listed tools.

6. "Expressly delegated" is partisan doctrine.

Jefferson in attempting to limit Congress to the enumerated powers argued that the first clause of section

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[72] *Id.* at 33.

[73] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 JEFFERSON PAPERS 71.

[74] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[75] *Id.* at 405.

8 gives Congress the power to tax "to provide for the common Defence and the general Welfare" only as a preface, to be given a more specific meaning by following clauses. It was as if the tax clause said that Congress could tax "for common defense and general welfare, *specifically* or *namely* for the powers of clauses 2-17." The subsequent enumerated powers, Jefferson argued, are to give an "exact definition" of the general welfare language.[76] In FEDERALIST NO. 41, Madison argued that the fact that the phrase, "common Defence and general Welfare," in Article I, section 8, clause 1 was not "separated by a longer pause than a semicolon" from the enumerated powers of clauses 2-17 was evidence that the enumerated powers specified what was within the general welfare.[77]

In the Articles of Confederation from which the common Defence and general Welfare language came, however, Congress' power to raise funds for the common defense and general welfare is in Article VIII, separated by three long paragraphs from the enumeration in Article IX, and without any implication that the enumeration cuts back on the general powers in Article VIII. Both Article VIII and Article IX are separate and equal empowerments of the Congress. The Constitutional language, in any event, "does not say '"to provide for the common defence, and general welfare, in manner following, viz.,' which," as

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[76] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 JEFFERSON PAPERS 71-73 (referring to "the exact definition of powers immediately following" the general welfare clause).

[77] THE FEDERALIST NO. 41, at 277 (Madison) (Jan. 19, 1788). James Madison, Memorandum not used in letter to Andrew Stevenson (Nov. 27, 1830) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 453, 456 ("Memorandum not used in letter to Mr. Stevenson"). Madison also spent a great deal of time worrying about whether "common defense and general welfare" might have been separated by commas or colons, rather than semicolons, from the enumeration. The resolution of the issue in the text treats all that punctuation as beside the point.

Story noted, "would be the natural expression, to indicate such an intention."[78]

7. Close reading of the text refutes the "expressly delegated" interpretation.

If we use close-reading of the text, we will conclude that the text of section 8 is more consistent with the *ejusdem generis* (illustrative) interpretation of the enumerated powers than with *expressio unius est exclusio alterius exclusio* (exhaustive) interpretation. On the face of them, the listed powers in clauses 2-17 of section 8 are not statements of the great goals of government. They are just specific programs or instruments the drafters thought they would like to do in the short run. They often have cumbersome detail. Clauses 11-15, for example, allow Congress to raise and support an army and a navy for the common defense, but over five paragraphs. It is difficult, for instance, to imply from the detail in those paragraphs that the Framers were trying to deny Congress the power to defend the country by ways not detailed. We may, for instance, need to find power to draft for the Air Force or even a space force to provide for the common defense, without shoehorning a draft for a military force in air or space into enumerated powers to provide for a military force on *land* or a naval force on *water*. They were not denying alternative methods to provide for the common defense just by listing some instruments they wanted, and some rules they wanted (no more than two-years of appropriation at once) about those instruments. The enumeration of section 8 is simply not a list of great powers or noble goals of government. The great goal of the national government is in clause 1, to provide for the common defense and general welfare.

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[78] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 908, 910, 911, at p. 371-72 (1833).

II. The Original Commerce Clause

The commerce clause was written to allow Congress to adopt a number of programs to punish imports, grant monopoly franchises and punish foreign shippers, all within the then dominant economic philosophy of mercantilism. No issue subjected to any debates has any application to problems in the twenty-first century.

Clause 3 of Article I, section 8 allows Congress to regulate commerce with foreign nations, and among the several states. The original intent of the commerce clause was to provide authority for a number of mercantilist programs, none of which have any appeal in the twenty-first century. Interstate commerce did not come up in the debates. Neither the original intent nor founding debates on the commerce clause provide any evidence of the values of the Founders helpful to resolution of issues of the general jurisdiction of the federal government.

To understand words of a historical document, one must first understand the core programs that words were written to accomplish.[79] In the original debates over adoption of the Constitution, "regulation of commerce" was used, almost exclusively, as a cover of words for specific mercantilist proposals related to deep-water shipping and foreign trade. The Constitution was written before Adam Smith, laissez faire and free trade came to dominate economic thinking. The commerce clause draws its original meaning from the preceding mercantilist tradition. The concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on imports, to preserve precious specie, were restrictions on international trade to give subsidy or protection to

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[79] *See, e.g.*, Quentin Skinner, *Meaning and Understanding the History of Ideas* in MEANING AND UNDERSTANDING: QUENTIN SKINNER AND HIS CRITICS 3, 55-65, 260 (James Tully, ed., 1988).

favored domestic merchants or were penalties on foreign shippers to induce foreign nations to drop their protectionist policies. Neither trade with the Indians nor interstate commerce were debated or thought about.

In *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*,[80] I collect a sample of 161 uses of the phrase "regulation of commerce" closely tied to the debates leading to the Constitution. The samples can be summarized quickly.

A. Regulation of commerce meant first to tax it.

"Regulation of commerce," most importantly and commonly, meant taxing imports on the national level. New York had a tax on imports, called an "impost," by which it paid for purely state purposes by taxing imports through New York harbor. Connecticut and New Jersey hated the tax. In Connecticut, the proponents of the Constitution warned that those "gentlemen in New York who receive large salaries . . . know that their offices will be more insecure . . . when the expenses of government shall be paid by their constituents, than while paid by us."[81] New York had rendered Connecticut and New Jersey tributary to New York, *Publius* said, by its "commercial regulations."[82] Nationalizing the New York and other state imposts would also allow the federal government to increase the rate of tax on imports because it would prevent one state from undercutting rates by providing a lower tax and an end run around high imposts. Under the (now discredited) mercantilist economics then dominant, any suppression of imports by tax or restriction would preserve precious specie and serve the national welfare.

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[80] Calvin Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL OF RIGHTS J. 1 (2004).

[81] *Editorial*, CONNECTICUT COURANT (Dec. 24, 1787) *reprinted in* 15 DOCUMENTARY HISTORY 82.

[82] THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 7, 1787).

Federal revenue was also critical to the Founders to restore the public credit so they could borrow in the next and inevitable war. While nationalizing the state imposts was the most important "regulation of commerce" issue, clause 1, the tax clause, is itself sufficient to authorize nationalization of the state imposts. Nothing is added by the commerce clause.

B. Nontax regulation of commerce referred to mean-spirited mercantilist programs that were never adopted.

Beyond tax, "regulation of commerce" was used as a reference to three restrictive mercantilist programs that never had enough political strength behind them to be seriously considered: (1) an American Navigation Act, giving Northern shippers a monopoly on the export of Southern commodities, (2) a retaliatory impost against the British to induce the British to open up the West Indies ports to American ships, and (3) port preferences requiring that all dealings with foreigners be conducted through preferred ports. None of the three programs – a monopoly for American shippers, a retaliatory impost against the British, or port preferences – were ever adopted and indeed port preferences were banned by the Philadelphia Convention itself. This is of course to be celebrated. All of the programs were mean-spirited programs that would ultimately hurt American consumers. With the demise of mercantilism as a guiding light, it would be terrible if we were bound by the Founders to adopt programs with such little true economic merit.

C. Interstate commerce was not a material issue in the constitutional debates.

There was no substantial debate or program in 1787-1788 within the category of *interstate* commerce because the Founders saw no substantial burdens on interstate commerce that needed to be discussed or corrected.[83] The

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[83] *The Panda's Thumb* at 42-46.

Articles of Confederation had already prohibited a state's imposing taxes or regulations on an out-of-state American that it was unwilling to impose on its own citizens[84] and that norm was almost uniformly followed. The state imposts or taxes on imports exempted goods of American growth or produce so that by ratification there were no state taxes or burdens on interstate commerce. In the only significant reference to interstate commerce in the entire debates, Hamilton conceded that a toll on interstate commerce would require not only a repeal of the Articles' prohibition, but also an overriding of "the genius of the people of this country."[85] The Founders were concerned with fairness between the states, but the norm shows up outside of the commerce clause. As one thorough survey put it, "The thing that strikes one's attention in seeking reference to interstate commerce is their paucity."[86]

When Madison recorded the Convention's agreeing to the commerce clause, on August 16, 1787, without debate, he described the clause as the "[c]lause for regulating commerce with foreign nation and &c."[87] Regulation of commerce between the states and with the Indians shows up only within the space allowed by Madison's "&c."

The commerce clause exploded in importance from its original mercantilist meaning only because the best reading of the Constitution – a general power to provide for the common defense and general welfare – was blocked by the false supposition that clauses 2 through 17 were exhaustive. Returning to the original intent would require deciding jurisdiction of the Army Corps of Engineers under Congress' power to provide for the general welfare, and not under its mercantilist power to suppress and channel commerce.

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[84] ARTICLES OF CONFEDERATION, art. IV, 19 JCC 215.

[85] THE FEDERALIST NO. 22, at 137 (Hamilton).

[86] Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 470, 481 (1941).

[87] (Aug. 16, 1787) 2 FARRAND'S RECORDS 308.

The debates that give original meaning to the Constitution were debates about some very unattractive mercantilist programs. There were no debates about interstate commerce and no opportunity for the values of the Founders to show up there. To defer to the Founders on the scope of interstate commerce would be to defer to a constitutional nothing – they did not think about the scope of interstate commerce one way or the other. To try to base a twenty-first century government on 18th century debates on inter-state commerce is like trying to build a Cathedral on a swamp ooze, maybe on nonexistent swamp ooze.

It is, on the other hand, perfectly consistent with the values of the Founders that congressional power should expand to cover the necessities and the general interests of the union, where the sovereign Congress voted for it. Where Congress has determined that preservation of clean water and wetlands is in the general welfare, that is sufficient to make the activity constitutional.

CONCLUSION

Original intent does not confine the federal government to a narrow corral. The Constitution written allows Congress to provide for the "common Defence and general Welfare" of the United States. Under this standard, the United States Army Corps of Engineers may under the Clean Water Act deny a permit to build a multi-unit condominium which would cause extreme damage to the wetlands and pollute waters, and may punish illegal dumping and filling. Protecting the water of the country from pollution falls squarely under a national power to protect the general welfare of the country.

For these reasons the decisions of the Sixth Circuit in Carabell v. Army Corps of Engineers and Rapanos v. United States should be affirmed.

Respectfully submitted,

CALVIN H. JOHNSON
Amicus Curiae, pro se.

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In the
Supreme Court of the United States
October Term, 2004

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No. 04-1034 *consolidated with* No. 04-1384

JOHN A. RAPANOS *et al.*,
Petitioners,
v.
UNITED STATES,
Respondent.

JUNE CARABELL *et al.*,
Petitioners,
v.
UNITED STATES ARMY
CORPS OF ENGINEERS
et al.,
Respondents.

On Writs of *Certiorari* to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIÆ* CHARLES R. JOHNSON, ATLANTIC LEGAL FOUNDATION, DEFENDERS OF PROPERTY RIGHTS, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

MARTIN S. KAUFMAN
Counsel of Record for Amicus
Atlantic Legal Foundation
60 East 42nd St., Ste. 2102
New York, NY 10165
Tel.: (212) 867-3322
Fax: (212) 867-1022
mskaufman@ atlanticlegal.org

MICHAEL E. MALAMUT
Counsel of Record for Amici
Andrew R. Grainger
Martin J. Newhouse
New England Legal
Foundation
150 Lincoln St.
Boston, MA 02111
Tel.: (617) 695-3660 x 204
Fax: (617) 695-3656
michaelmalamut@nelfonline.org

QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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INTEREST OF *AMICI CURIÆ*

Amici Charles R. Johnson ("Johnson"), Atlantic Legal Foundation ("Atlantic Legal"), Defenders of Property Rights ("Defenders"), and New England Legal Foundation ("NELF") seek to bring to the Court's attention their views, and the views of their supporters, concerning the authority of the Army Corps of Engineers to regulate filling of inland wetlands under 33 U.S.C. § 1344, Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA").[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioners nor Respondent authored this Brief in whole

Amicus Curiæ Charles R. Johnson is a 73 year-old cranberry farmer from Carver, Massachusetts. He purchased his first cranberry bog in 1958 and currently farms approximately 140 acres of cranberry bogs. *The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure*, 107th Cong. 56 (Oct. 3, 2001) (statement of Charles R. Johnson) ("*Wetland Permitting Process*").

In 1999, the Environmental Protection Agency ("EPA") commenced a civil case in the United States District Court for the District of Massachusetts against Mr. Johnson, his wife, his son, and a family-owned limited partnership (collectively, "the Johnsons") for filling activity in wetlands associated with the creation and maintenance of his cranberry bogs, allegedly without a required permit under Section 404 of the Clean Water Act ("CWA"), 31 U.S.C. § 1344. *United States v. Charles Johnson et al.*, Civ. No. 99-12465-EFH (D. Mass.).

The Johnsons' principal defense to liability was that the cranberry bogs in question are remote from navigable waters and the only water flow from their property to the nearest navigable waterway was indirect, through a series of unnavigable (and often unnamed) tributaries. In other words, their argument is similar to that of the Petitioners that their property is too remote from navigable waters to come within EPA authority under Section 404 of the CWA, as clarified by this Court's decision in *Solid Waste Agency of Northern Cook*

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or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3 (a), counsel for *Amici* have submitted consents by both parties to the filing of this Brief.

County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("*SWANCC*").

The District Court granted partial summary judgment against the Johnsons on liability by order of May 6, 2004, and summary judgment on remedy by order of January 13, 2005. On March 22, 2005, the Johnsons filed their notice of appeal to the United States Court of Appeals for the First Circuit, where the case is now pending. *United States v. Johnson*, No. 05-1444 (1st Cir.).

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm incorporated in Pennsylvania in 1976. Its mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal's goal is to advance the cause of economic and individual freedom by making government—federal, state, and local—more accountable and less intrusive. Atlantic Legal seeks to advance these goals through litigation and public advocacy and education. Atlantic Legal provides *pro bono* legal representation to individuals, corporations, trade associations, and similar groups.

Atlantic Legal's supporters include individuals, business enterprises and philanthropic foundations. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, business executives, retired public officials and judges, and prominent scientists.

Atlantic Legal has appeared in this Court and in numerous federal and state appellate courts as an *amicus* or as counsel to *amici*. Among the cases in this Court involving property rights, excessive regulation of land use, or environmental regulation in which Atlantic Legal has appeared

include *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *RCK Properties, f/k/a Forest Properties v. United States*, 528 U.S. 951 (1999); *Cole v. County of Santa Barbara*, 537 U.S. 973 (2002); *Hansen v. United States*, 535 U.S. 1111 (2002); and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

Other cases in this Court involving issues of constitutional or public policy importance in which Atlantic Legal has appeared as *amicus* or counsel for *amici* include *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S.217 (2000); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); and *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152 (October Term 2005).

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991 and has 23,000 members. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.

Ct. 2764 (2005); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance of regulation in regard to property development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use

because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 125 S. Ct. 2491 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 125 S. Ct. 1517 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000).

Amici believe that the protection of owners' rights to reasonable development are important building blocks of democracy. The appearance of *Amici* in these consolidated cases is desirable to provide the Court with a public policy perspective that Clean Water Act section 404 authority should not be interpreted to extend federal regulation to encompass virtually every body of water, no matter how remotely and tenuously "connected" to a navigable waterway and to intrude upon local land use regulation. The potential for duplicative land-use regulation by both the state and federal governments imposes significant costs on property owners and developers.

Amici Curiæ therefore believe that this brief provides an additional perspective which may aid the Court in determining the issues raised in the petitions of the petitioners in these consolidated cases (collectively "Petitioners"): John A. Rapanos *et al.* (the "Rapanoses") and June Carabell *et al.* (the "Carabells").

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Briefs of Petitioners.

SUMMARY OF ARGUMENT

These cases deal with the extent of the United States Army Corps of Engineers' authority to regulate the dredging and filling of inland wetlands under the CWA, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). In a recent decision, this Court restricted the Corps' authority to regulate inland wetlands. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). Since then, the Corps has attempted to avoid the teaching of *SWANCC* by relying on an alternative theory – the "Hydrologic Connection Rule," that would extend regulatory authority to any wetland with a "hydrological connection," direct or indirect, with navigable waters. The Corps thereby seeks to retain its asserted authority over virtually all inland wetlands. The Court of Appeals for the Sixth Circuit held below that even though Rapanos' lands are 20 miles from "navigable-in-fact water," *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003), *cert. denied*, 451 U.S. 972 (2004), they are within the jurisdiction of the Corps under the CWA because they share a so-called "hydrological connection" with the distant rivers. This supposed "connection" between one parcel of property and a distant navigable river is remote to at least the third degree: In *Rapanos*, "[t]he wetlands are connected to the Labozinski Drain (a one hundred year-old man-made *drain*) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin *eventually* flows into Saginaw Bay and Lake Huron." 339 F.3d at 449 (emphasis added). In *Carabell*, the wetlands are "connected" by

groundwater flow through a man-made berm to an "unnamed ditch . . . connected to the Sutherland-Oemig Drain, [which] empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie." *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005). By its silence, the Court of Appeals indicated that neither the "drains" nor the "creeks" are navigable.

Moreover, the Corps' interpretation of the CWA raises serious constitutional implications under Commerce Clause jurisprudence, as reiterated by this Court in *SWANCC*. Nationwide federal wetland jurisdiction impinges on the traditional police powers of state and local governments over land-use decisions. This court should therefore interpret the CWA as limited to navigable-in-fact waterways and wetlands immediately adjacent thereto in order to avoid possible constitutional problems.

Amici argue that the Fifth Circuit's interpretation of the CWA, which limits the Corps' authority to wetlands that are *adjacent* to national navigable waterways, is in accord with Congress's intent as correctly set forth in this Court's precedents.

ARGUMENT

I. The "hydrological connection rule," which would extend the Corps' regulatory authority to all inland wetlands, is inconsistent with this Court's holding that the Corps' dredge-and-fill authority is limited to wetlands adjacent to navigable waters.

Amici argue that the Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA")

violate Congress's intent, as explicated by this Court in *SWANCC*, by interpreting the CWA to allow them to regulate work in wetlands that are not immediately adjacent to navigable-in-fact federal waters. Section 404 of the CWA, 33 U.S.C. § 1344, gives the Army Corps of Engineers authority to grant permits for work in wetlands, as part of its authorization to regulate dredging or filling activity in "navigable waters." The EPA is the agency charged with enforcing the CWA, including commencing administrative and court proceedings for alleged violations of Section 404 permitting rules. *Id.* The original regulations issued by the Corps under the CWA in 1974 claimed modest geographic coverage of "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1) (1975). *See SWANCC*, 531 U.S. at 168.

By 1977, the Corps had considerably expanded its asserted authority to "isolated wetlands." 33 C.F.R. § 323.2 (a) (5) (1978). *See SWANCC*, 531 U.S. at 168–69. In 1986, the Corps promulgated the "migratory bird rule" as a "regulatory clarification" of its expansive claims of regulatory authority. 51 Fed. Reg. 41217 (1986). *See SWANCC*, 531 U.S. at 164. The Corps maintained that the "migratory bird rule" extended CWA regulatory authority to any waters used as habitat for migratory birds. *SWANCC*, 531 U.S. at 164. Because migratory birds utilize virtually every wetland, the Corps used the rule to extend its authority over dredging and filling to virtually all wetlands nationwide, no matter how remote from navigable-in-fact waters.

CWA prohibits unauthorized discharges "into the navigable waters." 33 U.S.C. § 1344(a). In this Court's

jurisprudence concerning the Nation's waterways, the term of art "navigable" has had one meaning: whether the waters in question can be traversed or reasonably be made traversable by boat. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–09 (1940); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 122–23 (1921); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Just four years ago, this Court recognized that the holding of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), expanded the meaning of "navigable" slightly, but emphasized that it did not intend to "read[] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. "[W]hen a statute uses . . . a term, Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

Although this Court had said in *Riverside Bayview Homes* that the word "navigable" in 33 U.S.C. § 1344 (a) was of "limited effect," in *SWANCC* it recognized that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. This Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

In *SWANCC*, this Court restricted the Corps' expansive geographic extension of its Section 404 regulatory authority by invalidating the "migratory bird rule." *SWANCC* decided that the Corps could not interpret the CWA to exercise the authority to regulate wetlands formed by an abandoned gravel mining operation in metropolitan Chicago, simply because migratory aquatic birds used the site for habitat. *SWANCC*, 531

U.S. at 163, 171–72. The Corps had claimed that because there were commercial activities associated with migratory birds and those birds landed on the pond in question, the pond affected interstate commerce. This Court rejected that argument, finding that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171. The Court "decline[d] respondents' invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404 (a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171–72. The Court made it clear that isolated ponds are not subject to the CWA.

After *SWANCC*, the Corps and the EPA sought to limit that decision exclusively to its particular facts and the specific Corps policy at issue in *SWANCC*, the "migratory bird rule." They did not eschew their claim of virtually universal regulatory authority over wetlands; indeed, the Corps and EPA have expressly adopted an agenda to prevent any conversion of wetlands to development anywhere in the nation, irrespective of proximity to navigable waters. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, News Release (Jan. 10, 2003), *available at* http://www.usace.army.mil/inet/functions/cw/hot_topics/admin_affirm_nr.pdf. To maintain their assertion of expansive authority over wetlands wherever located, the Corps and the EPA now rely on the "hydrological connection rule" in these and other cases. In doing so, they are merely using a different vehicle to reach a result already invalidated by the *SWANCC*

decision.[2]

The "hydrological connection rule" is a Corps policy, not formally adopted as a regulation,[3] that treats wetlands as "navigable waters" under the Section 404, so long as water from the wetlands flows, however intermittently or indirectly, to navigable or tidal waters. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). The meaning of "hydrological connection," as used by the Corps and EPA as a basis of regulatory authority is open-ended and expansive. There is no discernable end point to this approach other than the inclusion of virtually every body of water.[4]

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2 The adverse effects on ordinary citizens, including Petitioners, of the Corps and EPA's overly broad and heavy-handed approach to its CWA authority were the subject of in-depth discussions during Congressional hearings shortly after the *SWANCC* decision. *See The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure*, 107th Cong. 56 (Oct. 3, 2001). *Amicus* Charles R. Johnson was one of the witnesses at the hearing.

3 The "hydrological connection rule" is an administrative interpretation of the Corps' regulation extending its Section 404 authority to waters that contribute some flow of water to navigable waterways. 33 C.F.R. § 300.5 (d). *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

4 A number of courts have held that a "hydrological connection" to navigable waters includes connection through groundwater flows. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178–80 (D. Idaho 2001) (interpreting *SWANCC*; "[T]he CWA extends federal regulatory authority over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 Envt'l L. 113, 134–35 (2003). In other courts, the EPA has urged a definition of "hydrologically connected" that would exclude groundwater flows. *See, e.g.,*

With certain limited exceptions (primarily the Great Basin area centered on Nevada and Utah)[5] virtually all the territory of the United States is within the watershed of either the Atlantic or the Pacific Ocean and therefore ultimately hydrologically connected with a navigable waterway. *See Continental Divide*, available at http://answers.com/topic/continental-divide-1&method=6; Columbia Encyclopedia, *Watershed*, available at http://www.bartleby.com/65/wa/watershe.html. The "hydrological connection rule" would expand Section 404 permitting authority to virtually all wetlands in the United States outside the Great Basin area.[6] As

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In re Needham, 354 F.3d 340, 345 (5th Cir. 2003); Craig, 33 Envt'l L. at 132–34. There is, in fact, no scientific basis for distinguishing between ground and surface waters. Conservation Technology Information Center, Perdue University, *Groundwater & Surface Water: Understanding the Interaction*, available at http://www.ctic.purdue.edu/KYW/Brochures/GroundSurface.html ("About 40% of river flow nationwide (on average) depends on groundwater.... Groundwater and surface water are fundamentally interconnected. In fact, it is often difficult to separate the two because they 'feed' each other. This is why one can contaminate the other."). The Army Corps has effectively conceded that there is no rational distinction between groundwater and surface water flows by asserting authority over wetlands such as those at issue in *Carabell*, which connect to surface waters ultimately connected to navigable-in-fact waters only through groundwater flows (in this case through a man-made berm). *See Carabell*, 391 F.3d at 708–09.

5 The Great Basin includes Utah's Great Salt Lake and California's Death Valley. *See* United States Geological Survey, *Geological Provinces of the United States: Basin & Range Province*, available at http://wrgis.wr.usgs.gov/docs/parks/province/basinrange.html; *Great Basin*, available at http://www.answers.com/topic/great-basin. Precipitation falling in the Great Basin, unlike that in the rest of the nation, stays within the Great Basin watershed and fails to flow ultimately towards either the Atlantic or Pacific Oceans. *Id.*

6 A proposed federal regulation intended to assert the Corps' post-*SWANCC* Section 404 regulatory authority would have covered

noted by the United States District Court for the Eastern District of Michigan, however, the artificial ponds at issue in *SWANCC* were hydrologically connected to neighboring navigable waters, apparently Lake Michigan, presumably through groundwater flows:

> It is worth noting that the majority opinion in [*SWANCC*] repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See* [*SWANCC*], 531 U.S. at 176 n.2 (Stevens, J., dissenting). The dissent notes that the wetlands in [*SWANCC*] are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

United States v. Rapanos, 190 F. Supp. 2d 1011, 1014 n.3 (E.D. Mich. 2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). *Accord FD & P Ents., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 514 (D.N.J. 2003).

This Court should follow the logic of *SWANCC* as

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approximately eighty percent of all wetlands nationwide. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n.18 (2003).

interpreted by the Court of Appeals for the Fifth Circuit. The Fifth Circuit has disallowed the Corps' expansive "hydrological connection rule." *See In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) ("[T]he United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . [only] if the body of water is *actually* navigable or *adjacent* to an open body of navigable water.'" (emphasis added) (quoting *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)). *Accord FD & P Ents.*, 239 F. Supp. 2d at 526. The Fifth Circuit has given full recognition to the fact that this Court in *SWANCC* confined CWA regulatory authority to historically navigable and the tidal water bodies and wetlands abutting them:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But, we conclude that the text of the statute will not allow this.

SWANCC, 531 U.S. at 168 (emphasis in original). The Fifth Circuit persuasively construed Congress's intent to limit CWA regulatory authority to wetlands immediately adjacent to navigable-in-fact waters. *In re Needham*, 354 F.3d at 346.

Amici acknowledge that a number of other courts of appeals have agreed with the EPA and the Corps in adopting an improperly narrow reading of *SWANCC*, limiting it to the invalidation of the "migratory bird rule." *Rapanos*, 376 F.3d at 638. *Accord Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 709–10 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Reuth Dev. Co.*,

335 F.3d 598, 604 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533–34 (9th Cir. 2001); *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2000). These courts have allowed the EPA and the Corps to use an expansive "hydrological connection rule" to reassert virtually nationwide federal wetland regulation. They have dismissed as mere *dicta* this Court's teachings in *SWANCC* that criticize wide-ranging CWA Section 404 authority. *See Rapanos*, 376 F.3d at 638–39. As even environmental advocates acknowledge, however, the meaning of *SWANCC* is clear: the application of the Section 404 to wetlands not contiguous to navigable-in-fact waters is extremely limited. *See* Brian Knutsen, *Asserting Clean Water Act Jurisdiction over Isolated Waters: What Happens after the SWANCC Decision*, 10 Alb. L. Envtl. Outlook J. 155, text accompanying nn.136, 182–83, 228 (2005) (authority limited to nonnavigable waters with a "significant nexus" to actually navigable waters and "inseparably bound up" with navigable waters (quoting *SWANCC*, 531 U.S. at 167); under current regulations covered wetlands must actually be "neighboring" navigable waters).[7]

Regulatory history further supports restricted CWA authority over waters distant from and indirectly connected to navigable-in-fact waters such as those involved in these cases.

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7 "While this may allow jurisdiction over some wetlands that are not immediately adjacent in the traditional sense of the word, the majority of these isolated waters will be left outside the coverage of the current regulations." Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying n.183. *SWANCC* "seems to suggest that wetlands that are not 'adjacent' to some sort of open water—presumably a jurisdictional body of surface water—cannot be regulated under the statute. This would exclude from the CWA any waters that are not adjacent to other jurisdictional waters . . . ." *Id.* at text accompanying n.228.

As this Court has pointed out:

> [T]he Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined sec. 404 (a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." Sec. 209.260 (e) (1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

SWANCC, 531 U.S. at 168 (emphasis in original). The relevance of the Corps' original interpretation of the CWA to the "migratory bird rule" applies with equal vigor to the "hydrological connection" theory.

Notably, not only are the Rapanoses' and the Carabells' properties distant from navigable-in-fact waters, but the Corps has made no attempt in these cases to show that the Rapanoses' and Carabells' conduct had any adverse effect on navigation or commerce (as opposed to water quality) of the nearest navigable waterways.

II. The dredge and fill permit requirements under Section 404 of the Clean Water Act can extend only to wetlands adjacent to actual navigable and tidal waters.

This Court in *SWANCC* acknowledged that expansive CWA regulatory authority raised significant, constitutionally based federalism issues. *SWANCC*, 531 U.S. at 172–73. The CWA rests on Congress's power to regulate navigation under the Commerce Clause, Const. Art. I, § 8, cl. 3. *See SWANCC*, 531 U.S. at 168 n.3 (nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."). *SWANCC* recognized the constitutional limitation on regulatory authority under the CWA. *SWANCC*, 531 U.S. at 173 ("Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.") (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)).

This Court has recognized that the "traditional and primary power over land and water use" resides with the States: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251 (b)). This Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618–19 (emphasis in original) (quoting *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring)). The attempted creation of a police power over the waters that are not really navigable at all, and do not have a measurable effect on the economic activities of one or more States connected to interstate commerce, goes well

beyond the constitutionally limited powers of the federal government.

Lopez and *Morrison* were recently construed in *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005), in which this Court reiterated the longstanding division of permissible federal regulation under Commerce Clause into three categories:

> First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

Raich, 125 S. Ct. at 2205 (citations omitted). *See Lopez*, 514 U.S. at 558. In *SWANCC*, the agencies relied entirely on the third category (substantially affects interstate commerce). *SWANCC*, 531 U.S. at 173. This Court rejected that argument *SWANCC*, 531 U.S. at 173.[8] Therefore, in these cases the agencies purport

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8 This Court declined to interpret the CWA to grant the agencies regulatory authority under the "migratory bird rule" because, to do so, it:

> would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

to rely primarily on "channels of interstate commerce." *Rapanos v. United States*, No. 04-1034, United States Brief in Opposition to Petition for *Certiorari* ("United States Petition Opposition Brief") at 23.[9] In substance, however, in these cases, the agencies continue to rely on the aggregate effects on downstream waters under the third category, *id.*, contrary to this Court's teaching in *SWANCC*. They have simply substituted "hydrological connection" for migratory birds in selecting the method by which they claim interstate commerce is affected.

Indeed, "channels of interstate commerce," the category now principally relied on by the agencies, was in fact dismissed as a relevant basis of CWA regulatory authority by the United States Court of Appeals for the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997), a decision presaging *SWANCC*. The court determined that, "Congress may also regulate the discharge of pollutants into *nonnavigable* waters," only "to the extent necessary to protect the use or potential use of *navigable* waters as channels or instrumentalities of interstate commerce . . . ." *Id.* (emphasis in original). In other words, the regulation of "channels of interstate commerce" must be for direct purpose of enhancing navigation and commerce, which regulation of the wetlands at issue in these cases does not

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SWANCC, 531 U.S. at 173 (citation omitted). At least one author has opined that, after *SWANCC*, only regulations issued pursuant to the first category (channels of interstate commerce) really apply under the CWA. *See* Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying nn. 116–19 ("It appears that the Court views the CWA to only reach waters where jurisdiction is asserted through . . . 'the use of channels of interstate commerce.'").

9 *Raich*, which concerns solely the third category (substantially affects interstate commerce), is this largely distinguishable from these cases. *Raich*, 125 S. Ct. at 2205.

affect. The agencies claim authority, on the other hand, by asserting that any discharge of a pollutant into any water remotely hydrologically connected to a navigable water has an "aggregate" effect on "hydrological and ecological functions" downstream. United States Petition Opposition Brief at 24. As stated in *Wilson*, however, permissible federal regulation must have as its purpose the enhancement of *navigation* and *commerce*, as aspects of the federal commerce jurisdiction. 133 F.3d at 254. Hydrological and ecological aspects of water quality, on the other hand, are environmental goals primarily under the auspices of the states. 33 U.S.C. § 1251 (b).[10] Courts have repeatedly held, however, that land-use and water-use regulation is primarily a state and local concern under federalism jurisprudence: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The agencies' position in this case is thus an attempted reincarnation of their reliance on unmeasured downstream effects, which was found untenable by this Court in *SWANCC*, 531 U.S. at 173.

The federal government is a government of limited authority under the Constitution. The Commerce Clause cannot be read to grant general police powers to the federal government simply because an activity might have some remote economic consequences. *Lopez*, 514 U.S. at 567–68. The

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10 "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251 (b).

Commerce Clause regulates only "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. Congress's interstate commerce power, therefore, permits only regulation of navigation and potential navigational impacts through the CWA. *See Morrison*, 529 U.S. at 613. It is the states, on the other hand, whose police powers are primary in regard to protection of the environment.

The "hydrological connection rule," as applied in these cases, asserts federal regulatory authority over all wetlands nationwide that potentially fall in the watershed of either the Atlantic or Pacific Oceans. A subsequently withdrawn joint Corps and EPA proposal attempted to extended federal authority over 80 percent of all wetlands nationwide, negating the effect of *SWANCC*. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n. 18 (2003). Environmental advocates urged even broader coverage. *Id.* Subsequently, the EPA and Corps explicitly espoused a goal of no net loss of wetlands nationwide. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*. The "hydrological connection rule" would result in federal police power over land use that this Court cautioned against in *SWANCC*, 531 U.S. at 574. The agencies' interpretation of the CWA would impose a land-use regime where "there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567–68.

By equating anything with a "hydrological connection" to a navigable water to "navigable water" itself, the Sixth

Circuit has completely disregarded this Court's teaching in *SWANCC* and removed all meaning from the term "navigable." Removing the obvious and correct meaning of "navigable" from the CWA raises "serious constitutional problems." *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The reasonable interpretation of the CWA, to avoid unnecessary implication of constitutional principles, should exclude federal regulatory jurisdiction over isolated inland water bodies such as those at issue in *Rapanos* and *Carabell*.

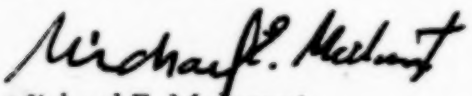
CONCLUSION

For the reasons stated above, this Court should reverse the decisions of the Court of Appeals for the Sixth Circuit below.

Respectfully submitted,

CHARLES R. JOHNSON, ATLANTIC LEGAL FOUNDATION, DEFENDERS OF PROPERTY RIGHTS, and NEW ENGLAND LEGAL FOUNDATION,

By their attorneys,



Michael E. Malamut
Counsel of Record
for Amici Curiæ
Andrew R. Grainger
Martin J. Newhouse
New England
Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660 x 204
Facsimile: (617) 695-3656
michaelmalamut@nelfonline.org

Martin S. Kaufman
Counsel of Record for Amicus
Curiæ Atlantic Legal Foundation
Atlantic Legal Foundation
60 East 42nd Street, Ste. 2102
New York, NY 10165
Telephone: (212) 867-3322
Facsimile: (212) 867-1022
mskaufman@atlanticlegal.org

December 2, 2005

Nos. 04-1034 and 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, Michigan 48640
Telephone: (989) 631-0900
Facsimile: (989) 631-0964
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Amicus curiae is in a unique position to discuss the instant cases, since the properties in question lie in Michigan, and since one of the Center's staff members is a former head of the Michigan Department of Environmental Quality (MDEQ), the state agency that administers the Michigan wetlands program.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are estimated to be more than 100 million acres of wetlands in the contiguous United States. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005). Through its expansive regulatory definition, the Army Corps of Engineers (Corps) has claimed jurisdiction over a substantial portion of this vast acreage.

But this Court has made clear that under the Clean Water Act (CWA), Congress intended to assert jurisdiction over only those wetlands adjacent to and inseparably bound up with "navigable waters," where "navigable" means

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than the amicus curiae, its members or its counsel make a monetary contribution to the preparation or submission of this brief.

waters that are, were, or could reasonably become navigable in fact. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (*SWANCC*). None of the properties involved in the consolidated cases meets this Court's definition of federally controlled wetlands, because the instant wetlands are not adjacent to and inseparably bound up with such navigable waters. As a consequence, the Corps has no jurisdiction over the instant wetlands.

Even if this Court now finds that the Corps' claim of jurisdiction over the instant wetlands is in keeping with Congress' intent, Congress would exceed its power under the Commerce Clause when the Corps' regulation at issue, 33 C.F.R. § 328.3 (2005), is applied to the instant properties. The regulation is not limited to channels of interstate commerce, and attempts to justify the regulation by appealing to the "substantial effects" commerce test (most recently elaborated in *Gonzales v. Raich*, 545 U.S. ___; 125 S. Ct. 2195 (2005)) are not persuasive in the instant cases, because this regulation does not concern a market-related statute, as the "substantial effects" test requires.

Since all of the properties in these consolidated cases are located in Michigan, and since federal jurisdiction over the instant wetlands is improper, a review of Michigan wetlands law and regulations will likely be of some interest.[2] It is clear that Michigan's regulatory system generally mirrors the federal system, probably because Michigan's

---

[2] This discussion should not be taken to imply that amicus curiae agrees that Michigan wetlands laws and regulations represent optimal public policy.

laws must be similar to, and perhaps as stringent as, federal law in order for the state to retain a modicum of control over the fill-permitting process. Michigan's permitting system is currently under review by the Environmental Protection Agency (EPA), and the EPA has demanded that Michigan make statutory changes, promulgate specific regulations, and issue attorney general opinions with foreordained results. This review process suggests the negative effect that federal CWA jurisdiction can have on our federalist system of government when that jurisdiction is construed too broadly.

Justice O'Connor recently explained the importance of limiting the power of Congress to regulate under the Commerce Clause:

> We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Raich, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

Exacerbating the federalist concerns presented in these cases is another constitutional issue: the nondelegation doctrine. Article I, Section 1 of the Constitution vests all "legislative powers herein granted . . . in a Congress of the United States." This Court has explained that the Constitution "permits no delegation of those powers."

Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 472 (2001). But this Court has historically held that Congress can constitutionally delegate rulemaking authority to an executive agency if Congress sets forth an "intelligible principle" to which that agency must conform. *Id.* Using this intelligible principle benchmark, this Court has not used the nondelegation doctrine to strike down a single federal law since 1935. *See generally Panama Ref. Co. v. Ryan*, 293 U.S. 238 (1935); *Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935).

In *Whitman*, Justices Stevens and Souter acknowledged that rulemaking is often the functional equivalent of legislative power. 531 U.S. at 488-89 (Stevens, J., concurring). They would hold that such delegations are generally proper. Justice Thomas, on the other hand, stated that "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). He expressed willingness "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.*

The nondelegation issue is not overtly presented in either of the instant cases, since this Court granted certiorari solely on the statutory and Commerce Clause issues. But the nondelegation doctrine is worth prominent mention here since it appears that in *SWANCC*, this Court forewarned that it will not defer to agency rules that press the outer limits of Congress' constitutional power unless Congress explicitly permitted that result in legislation. *SWANCC*, 531 U.S. at 172-73. Clearly, such agency rules

are too important to be left to unelected and largely unaccountable agencies. In other words, where the limits of Congress' constitutional powers are involved, "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" This conclusion is particularly true in the instant cases, where a rule promulgated by the Corps has substantially expanded the scope of federal jurisdiction.

This *SWANCC* doctrine is laudable as far as it goes, in that it at least exempts a subset of significant questions – constitutional questions – from the control of federal agencies. Unfortunately, the decision still leaves other significant questions within federal agencies' control.

Regardless, as noted above, this Court need not reach the nondelegation issue. This Court's recent rulings make clear that the Corps has overreached in its current statutory interpretation of Congress' intent in the CWA, rendering invalid the Corps' claim of jurisdiction in the instant cases. Even if this Court does rule that the Corps has properly carried out Congress' intent by extending federal jurisdiction to the instant wetlands, Congress' action would unconstitutionally exceed the power granted to Congress under the Commerce Clause.

ARGUMENT

A. Background

These consolidated cases concern four properties. John Rapanos or his affiliated parties were held to be civilly liable for filling wetlands without a permit on three separate properties: Salzburg, Hines Road, and Pine

River.[3] The Carabell property owners were denied a permit to place fill on a single property. In both cases, the petitioners claim that federal jurisdiction does not extend to their property; therefore, even if there are wetlands on the properties, those wetlands cannot be regulated by the Corps.

An issue in these cases is the proper meaning of "navigable waters," which for purposes of the CWA, was defined by Congress as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).[4] The Corps was delegated the responsibility to further define "waters of the United States." The pertinent part of the Corps' current (and overly expansive) definition is:

> (a) The term waters of the United States means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of

[3] John Rapanos also was criminally convicted for improperly placing fill on the Salzburg property. The criminal conviction is not at issue here.

[4] The history of the CWA and of the federal regulations regarding the Corps' definition of "navigable waters" and/or "waters of the United States" will be discussed in more detail below.

which could affect interstate or foreign commerce including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3 (2005).

It is unclear whether water from the Carabell petitioners' property ever reaches water that meets the definition in (a)(1).[5] The magistrate judge's recommendation, which was accepted in its entirety by the district court, described the property as follows:

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[5] As will be discussed below, in *SWANCC*, this Court has clearly held that Congress meant to regulate waters that meet the (a)(1) definition and those wetlands adjacent to and inseparably bound up with such waters.

> Plaintiff's property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that ditch connects to the Sutherland-Oemig Drain. (Tr. 55-61). The Drain, which neighbors a corner of the property, connects to Lake St. Clair.

Carabell App. at 46a. The unnamed ditch appears to have been dug "some 50-60 years ago." *Id.* at 62a. The spoils from that ditch left a man-made berm that separates the property from the ditch. *Id.* The Carabell property owners claimed that the water from the property never reached the drain, *id.* at 22a, but the magistrate judge did not make a specific finding in this regard.

A specific finding was made in regard to all three properties owned by the Rapanos petitioners; the trial court found that water from all three properties would eventually reach water that meets the (a)(1) definition. At the Salzburg site, the water entered a drain, then a tributary, then a river, then a second river, before it could reach Lake Huron. Rapanos App. at B11. At the Hines Road site, the water went from a drain to a navigable river. *Id.* at B20. Finally, at the Pine River site, there was a connection to a river that drained into Lake Huron. *Id.* at B26. The Rapanos petitioners claim that the nearest navigable water for the Salzburg site is twenty miles away, Cert. Brief of Rapanos Pet'rs-Appellants at 6, but the trial court did not make a specific finding in this regard. Nevertheless, a portion of the Salzburg site was the basis of John Rapanos' criminal conviction, and the Sixth Circuit stated, "During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water." *United States v. Rapanos*, 339 F.3d 447, 449 (6th

Cir. 2003). No findings were made regarding the distances to navigable waters for the Hines Road and Pine River sites.

Thus, with the Carabell site, this Court is faced with a property abutting a drain that may or may not receive surface runoff from the property. With the Rapanos sites, runoff from all three properties may eventually reach a body of water that meets the (a)(1) definition, but it is not clear how far the runoff would have to travel to reach such waters, nor is it clear what the filtering effects of such an extended route might be. In both cases, the property owners contend that their property is not covered by the CWA.

B. Congress' jurisdictional intent

Assuming that the federal permitting scheme controls in the instant cases,[6] this Court must determine whether the Corps through its current definition of "waters of the United States" has properly interpreted Congress' intent regarding the waters that are to be regulated under the CWA. This Court has discussed the bounds of federal jurisdiction over wetlands in two cases: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *SWANCC*. When these cases are read in conjunction, it is clear that Congress intended to limit the CWA's jurisdictional reach to waters covered by the Corps' 1974 definition[7] of navigable waters and to wetlands adjacent to and inseparably bound up with such waters.

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[6] Michigan law regarding wetlands and the effect of 33 U.S.C. § 1344(g) will be discussed below.

[7] This definition will be set forth below.

This conclusion is justified by the statutory and regulatory history related to the CWA and the Corps' definition of "navigable waters" and/or "waters of the United States." As part of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972,[8] Congress created a program for issuing fill permits. Under this program, the "discharge" of any "pollutant" is generally prohibited. 33 U.S.C. § 1311(a). Rock, sand, and dirt are treated as pollutants, 33 U.S.C. § 1362(6), and discharge is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A party that wants to discharge fill into a "navigable water" has to obtain a permit, 33 U.S.C. § 1344(a), and most importantly to the instant cases, "navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

It is clear that in enacting the definition in § 1362(7), Congress was simply attempting to remedy perceived shortcomings in the Corps' interpretation of the term "navigable waters" under sections 10 and 13 of the Rivers and Harbors Act of 1899. In a report published in 1972, Congress admonished the Corps for merely seeking jurisdiction over navigable-in-fact waters, instead of including waters that had been navigable in fact, or waters that with reasonable improvements could become navigable in fact. H.R. Rep. No. 92-1323 at 29-30 (1972).

After this admonishment, and one month prior to the enactment of the FWPCA Amendments of 1972, the Corps promulgated a regulation that defined "navigable waters" as "those waters which are presently, or have been in the

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[8] The Federal Water Pollution Control Act is the CWA's formal title.

past, or may be in the future susceptible for use for purposes on interstate or foreign commerce." 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972).

The definition was expanded slightly in 1974. The Corps defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

A lawsuit was brought challenging this definition on grounds that it was not broad enough, and a district court judge held that Congress meant to assert jurisdiction over water to the fullest extent permissible under the Commerce Clause, a concept the court did not define. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). The Corps was given forty days to issue a new regulation.

Rather than appeal, the Corps instead promulgated an interim regulation that significantly broadened the definition of "navigable waters" to include "freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters." 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). Other navigable waters included tributaries of rivers, lakes, and streams. *Id.* Also included were "intrastate lakes, rivers, and streams" that were used recreationally or that were tangentially related to commercial fishing, industry, or agriculture. *Id.*

In 1977, the Corps finalized the regulation. 42 Fed. Reg. 37,122 (July 19, 1977). At that time, Congress was considering amendments to the CWA. An amendment that

would have limited federal jurisdiction of wetlands to the Corps' more narrow 1974 definition passed the House, but a similar amendment was defeated in the Senate. Hence, the CWA amendments that Congress passed on December 27, 1977, did not change the CWA definition of "navigable waters."

Over the years, the Corps' 1977 definition of "navigable waters" has become slightly more expansive, and eventually the Corps settled on its current definition of "waters of the United States." Aside from the creation of the Migratory Bird Rule (discussed below), the course of definitional changes from 1977 to the present is not pertinent here.

This Court's first decision regarding the scope of federal jurisdiction under the CWA was *Riverside Bayview Homes*. There, this Court determined whether the owner of "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan" needed to obtain a fill permit.[9] 474 U.S. at 124. The wetlands at issue extended past the owner's property line and were adjacent to a navigable creek. *Id.* at 131. This Court indicated that there were two questions presented: (1) whether the property was an "adjacent wetland" under the regulation (essentially the same regulation at issue here);

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[9] This description seems incomplete given that the property had been platted for a subdivision as early as 1916, at which time storm drains and fire hydrants were installed. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 392 (6th Cir. 1984), *rev'd*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Further, the wetlands came into being only in 1973, due to the creation of an emergency dike in relation to rising water levels in Lake St. Clair. *Id.* at 393. The owner started filling the property in 1976.

and (2) whether the Corps could require the owner to obtain a permit.

Foreshadowing this Court's actions in *SWANCC*, the Sixth Circuit had narrowly construed the Corps' jurisdictional regulation in its *Riverside Bayview Homes* decision to avoid a constitutional problem – in that case, a potential regulatory taking, rather than the scope of Congress' commerce power, the issue presented in the instant cases.[10]

But this Court held that there was no justification for the Sixth Circuit's narrow construction of the regulation, since even if there were to be a taking, the owner of the property would be compensated. Therefore, this Court did not believe that there was a serious constitutional issue presented.

This Court then indicated that in enacting the CWA, Congress did not choose to limit the waters covered to traditional navigable waters. Congress' decision to define "navigable waters" as "waters of the United States" meant that the term "'navigable' as used in the act is of limited import." 474 U.S. at 133. This Court stated that Congress intended to "regulate at least some waters that would not be deemed 'navigable' under the classic definition of that term," *id.*, concluding that it was permissible for the Corps to regulate wetlands that were adjacent "to waters as more conventionally defined." *Id.* The Corps' conclusion "that adjacent wetlands are inseparably bound up with the 'waters' of the United States," *id.* at 134, was cited with

[10] The Sixth Circuit's decision was issued three months before this Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Sixth Circuit therefore did not address that case.

approval. Thus, this Court held that the Corps' construction of the statute was entitled to deference under *Chevron*. In *Riverside Bayview Homes*, unlike *SWANCC*, this Court did not discuss whether a Commerce Clause consideration would prevent deference to the agency's interpretation of its jurisdiction under the CWA. Thus, this Court concluded that the Corps properly asserted jurisdiction over the wetlands at issue.

This Court also noted that it was not "called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-32 n. 8. Therefore, the key concepts were that the wetlands needed to be adjacent to "open water" and inseparably bound up with those waters.

This Court's second case discussing federal jurisdiction under the CWA was *SWANCC*. There, a consortium of Illinois municipalities was seeking to locate and develop a disposal site for nonhazardous solid waste. The consortium chose an abandoned sand and gravel pit. Over the course of time, the excavation trenches from that site became seasonal ponds. The consortium sought to fill some of these ponds. The Corps originally concluded that it did not have jurisdiction over the ponds because they did not meet the definition of wetlands. But in 1986, the Corps, without following the dictates of the Administrative Procedure Act, had issued the "Migratory Bird Rule." This regulation purported to give the Corps jurisdiction over intrastate water that could be a habitat of migratory birds.

After the Corps claimed that it had jurisdiction solely due to the Migratory Bird Rule and denied the consortium a fill permit, the consortium brought suit. This Court held

that the Migratory Bird Rule was not fairly supported by the CWA. It also clarified the *Riverside Bayview Homes* holding.

In *SWANCC*, this Court explained that the key concept in *Riverside Bayview Homes* was the proximity of the wetlands to traditional navigable waters:

> [W]e held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See 474 U.S. at 135-139. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." 474 U.S. at 134.
>
> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." 474 U.S. at 131-132, n. 8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

531 U.S. at 167-68.

This Court emphasized that the Corps' 1974 regulation correctly set forth Congress' intent about the waters to be regulated. *Id.* at 168. This Court rejected the argument that Congress acquiesced in 1977 to the Corps' broadened definition of CWA jurisdiction; rather, the most Congress had contemplated in 1977 was extending federal jurisdiction to waters covered by the Corps' 1974 regulation and wetlands that were adjacent to and inseparably bound up with those waters:

> We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' [1977] regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. . . . Beyond Congress' desire to regulate wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

Id. at 170-71.

The next question addressed was whether *Chevron* deference should apply. Under the traditional *Chevron* analysis, when construing an agency regulation, the courts must consider two issues: (1) whether Congress' intent was clear, since Congress' clear intent must be given effect; and (2) whether, in cases where Congress' intent was not clear, the agency's interpretation was based on a permissible construction of the statute. 467 U.S. at 842-43. The courts defer to the agency's determination whenever an agency must fill a statutory gap. *Id.* at 843-44.

In *SWANCC*, this Court held that the CWA was clear. This ruling would ordinarily end the analysis; however, this Court then went on to address the level of deference the courts should give an agency regulation that nears a boundary of Congress' power:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid*. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

531 U.S. at 172-73.

The above is an exception to the norm of agency deference. Respectfully, however, this Court's ruling in

SWANCC is a partial solution to a much larger underlying problem: the delegation of important legislative issues to unelected and largely unaccountable federal agencies. *SWANCC* does require that the people's elected representatives explicitly make the decision that pushes the boundaries of Congress' constitutional powers, but this still leaves many other significant issues to be decided by federal agencies.

Whatever the basis for *SWANCC*'s modified *Chevron* rule, it is clear that the Corps' current, expansive jurisdictional regulation should not control in these cases. As a primary matter, in *SWANCC*, this Court held that the CWA was clear; Congress intended to regulate only those waters that meet the Corps' 1974 definition of "navigable waters" and those wetlands that were adjacent to and inseparably bound up with those waters. None of the instant properties meets this conjunctive test. None of the properties is adjacent to waters that are navigable, were navigable, or with reasonable effort could become navigable. Therefore, federal jurisdiction should not extend to any of the properties.

But even if this Court now determines that the CWA is ambiguous, the modified *Chevron* rule does not grant deference to an agency determination that pushes the limit of congressional authority, as the Corps' current definition clearly does. Hence, the regulation should be interpreted to avoid constitutional issues, a goal this Court can accomplish by interpreting the regulation to extend jurisdiction only to waters like those in *Riverside Bayview Homes* and *SWANCC* – waters that meet the Corps' 1974 definition, as well as wetlands that are adjacent to and inseparably bound up with the waters in that definition.

C. Commerce Clause

If this Court were to find that Congress intended to regulate wetlands like those of the petitioners', this Court should nevertheless rule that Congress has exceeded its commerce power, since a nonadjacent wetland or a wetland that is not bound up with traditional navigable waters is not a channel of interstate commerce. Further, this Court should reject any attempt to use the "substantial effects" theory to justify the constitutionality of such a congressional action. This Court has countenanced this theory only when a market-based statute is being interpreted.

In *Raich*, this Court discussed Congress' commerce power. There are three general categories under which Congress may engage its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Raich*, 125 S. Ct. at 2205.

This Court clarified that the substantial effects test applies only to market-based statutes – a point that may prove dispositive in the instant cases. *Raich* involved a challenge to the Controlled Substances Act (CSA), and in that statute, Congress sought to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.* at 2203. To achieve these goals, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance." *Id.* The petitioners in *Raich* were Californians who sought to use medical marijuana under a state law that allowed such use. The petitioners

did not challenge the CSA in its entirety; rather, they challenged its application to them.

In *Raich*, this Court discussed *Wickard v. Filburn*, 317 U.S. 111 (1942), a case in which a farmer was prohibited from growing more wheat than permitted under a federal administrative mandate. There, the farmer was going to consume the excess wheat on his own farm, and he argued that Congress did not have the power to regulate the wheat that was intended for his home use. In *Raich*, this Court held that local activities may be regulated when those local activities would have a substantial effect on a national market:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'"
>
> . . .
>
> *Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

Id. at 2205-06 (some citations omitted).

This Court also distinguished two of its recent Commerce Clause cases: *United States v. Lopez*, 514 U.S. 549 (1995); and *Morrison v. Brzonkala*, 529 U.S. 598 (2000). In *Lopez*, this Court overturned the Gun-Free School Zones Act of 1990, and in *Morrison*, this Court overturned a provision of the Violence Against Women Act of 1994 that created a federal civil remedy for the victims of gender-motivated crimes of violence. In *Raich*, this Court clarified that the key concept was that neither case concerned economic statutes:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.

Raich, 125 S. Ct. at 2211.

Justice Scalia concurred in *Raich*, but his analysis differed from that of the majority. Specifically, he believed that the substantial effects test was in reality a subset of Congress' power to enact legislation under the Necessary and Proper Clause. But like the majority, Justice Scalia would not allow Congress to regulate local activity where no market is involved: "the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective." *Id.* at 2218 (Scalia, J., concurring).

Clearly, the CWA is not a market statute, since it does not deal with the production, distribution, and consumption of commodities. The pollutants being regulated are not commodities intended for purchase by consumers, and any emission of the "pollutants" would be incidental and haphazard – not an organized process of bringing commodities to market for sale. Therefore, the substantial effects test does not apply.

Respondents may argue that in reality the CWA is a regulation of interstate channels of commerce. And indeed, to the extent that the CWA is limited to waters that either are navigable, were navigable, or with reasonable effort could become navigable, the CWA is a permissible exercise of Congress' commerce power, since these waters do constitute channels of interstate commerce. But Congress could not include wetlands that are not adjacent to the above waters or wetlands that are not inseparably bound up with such waters, because such wetlands do not constitute a channel of interstate commerce.

Respondents may argue that aggregated pollution from wetlands that are not adjacent or inseparably bound up with traditional navigable waters nevertheless produces a substantial effect on channels of interstate commerce. But this is an impermissible merger of two distinct Commerce Clause categories. Again, the substantial effects test is limited to market-based statutes. Therefore, if in enacting the CWA, Congress intended to regulate property like the petitioners', it exceeded its powers under the Commerce Clause.

D. Michigan's wetlands regulatory approach

Since both consolidated cases concern Michigan properties, this Court may be interested in Michigan wetlands law.[11] Indeed, the interaction of Michigan and federal wetlands law is instructive in this case, since it suggests that the federal agency's broad construction of its own jurisdiction promotes an imbalance in the federal-state relationship.

As part of the FWPCA Amendments of 1977, Congress enacted 33 U.S.C. § 1344(g) and (h), which allow a state to assume responsibility for issuing permits for the discharge of dredge or fill material. Michigan assumed authority for wetlands permitting in 1984, 40 C.F.R. § 233.70 (2005); Michigan is one of two states that have assumed such responsibility (the other is New Jersey).

Michigan's Wetlands Protection Act was enacted in 1979. In 1995, the state Legislature repealed it and then substantially re-enacted it as part of the state's Natural Resources and Environmental Protection Act. The wetlands protection section is currently codified at Mich. Comp. Laws §§ 324.30301-23. The CWA does not contain an explicit requirement that a state's permitting program be as stringent as the CWA, but the EPA, which authorizes state programs, has specifically interpreted it in that manner in a federal regulation. 40 C.F.R. § 233.1(d) (2005).[12] According to the EPA, nothing prevents a state

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[11] As mentioned earlier, the fact that Michigan laws and regulations are being discussed does not mean that amicus curiae believes that such laws and regulations reflect optimal public policy.

[12] This interpretation was implemented in 1988, after the Michigan program had already been approved. 53 Fed. Reg. 20776 (June 1, 1988).

from enacting more stringent requirements than those found in the CWA. 40 C.F.R. § 233.1(c) (2005).

Michigan asserts jurisdiction over wetlands that are (1) contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a river or stream; (2) not contiguous to any waters above, but more than five acres in size in a county with more than 100,000 residents;[13] (3) not contiguous to any waters in (1), but more than five acres in size in a county with less than 100,000 residents where a wetlands inventory has been completed for that county;[14] and (4) not contiguous to any waters in (1) and less than five acres in size where a determination is made that preservation of that wetland is necessary to protect the state's natural resources from destruction. Mich. Comp. Laws § 324.30301(p).

The MDEQ defines "contiguous" to mean either a seasonal or intermittent direct surface water connection with a lake, pond, river, or stream. Mich. Admin. Code r. 281.921(b) (2004). Also considered "contiguous" are any waters within 500 feet of a lake, pond, river, or stream, and any water within 1000 feet of a Great Lake or Lake St. Clair. *Id.* Wetlands that are separated from other

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[13] According to the 2000 Census, twenty of Michigan's eighty-three counties have more than 100,000 residents. http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-2&_box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US26

[14] There are twenty-two counties in Michigan that have not been inventoried: the twelve most western counties located in the upper peninsula, and ten counties in the northwest portion of the lower peninsula. http://www.michigan.gov/cgi/0,1607,7-158-12540_13817_22351-58858--,00.html. The MDEQ hopes to complete the inventory of the remaining counties by next year.

wetlands by dikes, roads, berms, and the like, but are otherwise close to lakes, ponds, rivers, or streams, are also considered contiguous.

While Michigan has been delegated the right to generally administer the fill-permitting process, the EPA can withdraw that designation. Michigan is currently undergoing an EPA review in order to keep its program. Preliminary findings were published in 2003, 68 Fed. Reg. 772 (Jan. 7, 2003), based on a 100-page report issued by the EPA's Region 5.[15] The EPA indicated that in light of the progress on the state's wetlands inventory and of legal uncertainty regarding the proper scope of federal jurisdiction, Michigan's jurisdictional requirements remain as stringent as the federal requirements, although the issue could be revisited later:

> Michigan's longstanding exclusion from regulation of all noncontiguous wetlands of any size that are located in a county with a population under 100,000 is a continuing concern for EPA. . . . If the wetland inventorying project is completed, EPA believes that our most significant concern with the scope of jurisdiction with Part 303 will be resolved. Furthermore, EPA expects that during the five years that these wetland inventories are being performed, the issues of the CWA's jurisdiction over isolated wetlands will be resolved and that EPA will have future discussions with Michigan regarding how the resolution of the CWA's jurisdiction impacts on

[15] This document is available at http://www.epa.gov/region5/water/wshednps/pdf/mi_404_program_review.pdf. This document will be cited as "Region 5 Review."

> Michigan's administration of the section 404 program.
>
> With respect to the 5-acre limitation imposed by Part 303's definition of the term "wetland" at § 324.30301(d), in light of the uncertainties about federal CWA jurisdiction created by the *SWANCC* decision, and the absence of EPA or Corps final guidance on the effect of *SWANCC*, at this time EPA does not conclude that Part 303's exclusion from regulatory jurisdiction of noncontiguous wetlands that are 5 acres or less renders Michigan's law less stringent than the federal law. This issue, too, may be revisited by EPA and Michigan in the future.

Region 5 Review at 7-8.

The EPA's preliminary finding about federal and Michigan jurisdiction is not dispositive, but is nevertheless worthy of mention in light of the Sixth Circuit's decision in the instant Rapanos case. There, the Sixth Circuit held that the district court was not required to make a determination whether the wetlands at issue were at least five acres, since Michigan did not have the authority to "alter the CWA's federal jurisdiction," and since there was "nothing in the CWA to suggest that by allowing Michigan to enforce portions of the CWA, the Corps was delegating the authority to the state to determine the limitations on CWA jurisdiction." Rapanos App. at A31.

But factoring in the EPA's claim that Michigan jurisdiction is coextensive with federal jurisdiction, an interesting question arises. If the state standards must be at least as stringent as the federal standards, and if the state has the responsibility for issuing the fill permits, why should not the state standards control? There would appear to be

no utility in referring to two separate sets of law when the federal agency already determined in 1984 that state law is as stringent. Presumably, if there were gaps in state law, the federal agencies would have refused to certify the state permitting program. This would seem to foreclose any argument that Michigan's law is less stringent, particularly when the federal government is making the claim.

Still, it is the understanding of amicus curiae that the Rapanos petitioners will not be addressing these issues. Thus, while such a question might be interesting, it is not among the questions presented to this Court.

The second area that the EPA is reviewing is Michigan's permit exemptions. The federal exemptions are found at 33 U.S.C. § 1344(f). Included in these exemptions are such activities as farming, silviculture (the care and cultivation of trees), some activities related to ranching, maintenance of dikes and levees, creation of stock ponds or irrigation ditches, maintenance of drainage ditches, and the creation of farm and forest roads. *Id.* Michigan's largely parallel provision is Mich. Comp. Laws § 324.30305.

In the EPA's review, numerous concerns were expressed about the Michigan exemptions. For example, the EPA noted that Michigan law did not limit its farming, ranching, or silviculture exemptions to those activities that were already established. Region 5 Review at 11. Another concern was that unlike federal law, Michigan law did not prohibit placing fill to convert the property from one exempted use to another – for example, from silviculture to farming. *Id.*

But in contrast to its jurisdictional review of Michigan's program, the EPA demanded statutory and regulatory changes to meet perceived shortcomings in Michigan's exemptions. For example, it demanded a statutory change to limit the agricultural exemption to already existing agricultural operations. *Id.* The EPA also demanded the promulgation of a state regulation delineating the geographical area covered by the agricultural exemption. *Id.* This regulation is supposed to mirror a federal appellate decision. The EPA also asserted that "it would be helpful to have the Attorney General's Office issue an Attorney General's opinion stating that the § 324.30305(2)(e) exemptions, as amended, as well as other exemptions established by Michigan law . . . shall be interpreted and applied by the MDEQ to be as stringent as the comparable federal exemptions." *Id.* at 11-12. The EPA made many other similar demands for statutory changes, regulatory changes, and Attorney General opinions.

This review process highlights federalism concerns present in the instant cases. In the EPA review, an unelected and largely unaccountable federal agency has placed a number of demands on Michigan's elected public officials. Granted, Michigan could choose not to participate in the wetlands permitting program, but it may well be that Michigan is willingly subjecting itself to such oversight precisely because the Corps has interpreted its jurisdiction so broadly that significant portions of Michigan are within the Corps' putative control. Michigan's subjecting itself to federal agency oversight is ultimately the only way the state can retain some modicum of local control over the issuance of fill permits and hopefully respond more quickly to citizens' requests.

If the Corps' jurisdiction were properly limited to its 1974 definition of navigable waters and those wetlands adjacent to and inseparably bound up with such waters, Michigan might choose to let the federal government administer its (now more modest) CWA program. At the same time, the state could then experiment with its own wetlands regulation more fully than it currently does, rather than promulgating policies that are – and must be – as stringent as those of the federal government. Such an arrangement would enable Michigan to serve as a true laboratory of democracy and perhaps discover an optimal public policy. A proper ruling from this Court would give Michigan and its citizens that freedom.

CONCLUSION

For the reasons set forth above, this Court should hold that all the properties at issue in these consolidated cases are not within federal jurisdiction.

DATED: December 2, 2005.

Respectfully submitted,

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, Michigan 48640
Telephone: (989) 631-0900
Facsimile: (989) 631-0964
Counsel for Amicus Curiae

No. 04-1384

In The

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

On A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE MACOMB COUNTY MICHIGAN IN SUPPORT OF RESPONDENTS

ERIC J. SMITH
Macomb County Prosecuting Attorney
MARK A. RICHARDSON
Macomb County Assistant Prosecuting Attorney for Water Quality
One South Main Street, 3rd Floor
Mt. Clemens, Michigan 48043
(586) 469-5350
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTEREST OF AMICUS CURIAE MACOMB COUNTY MICHIGAN

The economic prosperity of Macomb County depends on a clean, safe, and ecologically healthy Lake St. Clair. Lake St. Clair cannot be effectively protected however, unless its tributaries and wetlands are also protected.

Lake St. Clair is frequently called "the heart of the Great Lakes" because of its resemblance to a human heart on maps and satellite photographs and also because of its location in the middle of the St. Clair-Detroit River system connecting the upper Great Lakes to the lower Great Lakes.[1] Lake St. Clair is the smallest and shallowest of the glacial lakes forming the Great Lakes system.[2]

On the United States side, Lake St. Clair is bordered by the Michigan counties of Wayne, Macomb, and St. Clair. Macomb County's 53 miles of shoreline constitutes over 30 per cent of the total shoreline of the Lake, excluding the islands of the St. Clair Delta.

Lake St. Clair is an asset of remarkable value to the citizens of Macomb County and the entire Southeast Michigan region, providing superb conditions for recreational boating, fishing, diving, and swimming.[3]

---

[1] See *Exhibit* 1, Map of Lake St. Clair.

[2] Lake St. Clair has an area of about 430 square miles. It is about 26 miles long and 24 miles wide, and has an average natural depth of 12 feet. U.S. Army Corps of Engineers, *St. Clair River and Lake St. Clair Comprehensive Management Plan*, June 2004, at 1-25.

[3] The clear, shallow waters of Lake St. Clair provide ideal conditions for pleasure boating, swimming, and fishing. The Lake furnishes excellent habitat for warm-water fish such as walleye, yellow perch, small mouth bass, and muskellunge.

Lake St. Clair is one of the most heavily used recreational boating lakes in the world. Recreational boating on Lake St. Clair currently generates an estimated 249 million dollars a year in expenditures in the region. In 1994, the last year for which relevant statistics are available, there were 75 marinas in Macomb County alone.[4]

Much of the boating is for the purpose of fishing. Lake St. Clair supports one of the largest sport fisheries in the world, with an estimated direct value to the regional economy in excess of 30 million dollars per year. Forty-eight per cent of all sport fish and 33 per cent of overall fish caught *in the entire Great Lakes* are caught in Lake St. Clair.[5]

Petitioners' wetland lies within the Macomb County portion of the Anchor Bay watershed, an area that drains directly into Lake St. Clair. Macomb County has a direct and vital interest in upholding federal jurisdiction over Petitioners' wetland. Anchor Bay, located in the northwestern portion of Lake St. Clair, is one of the richest and most ecologically diverse areas of Lake St. Clair. To the east, Anchor Bay is bordered by islands of the St. Clair Delta, the only major river delta in the Great Lakes and one of the largest freshwater deltas in the world.[6] St.

[4] *St. Clair River and Lake St. Clair Comprehensive Management Plan*, *supra* at 7-127. More than 200,000 boats are registered in the four US counties on or near Lake St. Clair. This represents more than 20 per cent of all the boats registered in Michigan, and is a larger number of boats than are registered in the States of Maryland, Connecticut, and Kentucky, all of which have significant coastal or water resources. As of 1994, a total of 211 marinas were located in Wayne, Macomb, and St. Clair counties. *Id.*

[5] *Id.* at 7-128.

[6] *Id.* at I-24.

Johns Marsh, one of the largest coastal wetlands in the Great Lakes and a home to many rare or endangered plant and animal species, covers a major part of the north shore of Anchor Bay.[7] Major tributary streams that flow into Anchor Bay include Au Vase Creek[8] (also known locally as "the River Voss"), Beaubien Creek, Crapau Creek, Marsac Creek, Swan Creek, the Marine City Drain, and the Salt River.[9]

The Anchor Bay watershed contains approximately 38,000 acres of ecologically sensitive land, including a wide variety of wetland types.[10] At least 12 varieties of submerged plants and 300 species of benthic macroinvertebrates are found in Anchor Bay, providing outstanding habitat for fish and waterfowl.[11] Blessed with such resources, Anchor Bay provides outstanding recreational and aesthetic opportunities for the residents of

[7] Anchor Bay Technical Committee, *Anchor Bay Watershed Management Plan*, December, 2003, at 3.

[8] Originally the "Riviere Aux Vasse." "Au Vase" is a French phrase meaning "to the pot." Pers. Conv. With Gennifer Ayotte, November 3, 2005. In 1936, University of Michigan archeologists discovered at least 350 graves and large quantities of ceramic pottery fragments on the banks of the Au Vase. The Au Vase site dates to a segment of native American history known as the Late Woodland Era (about 1000 A.D. to 1400 A.D). Gonyeau, *Indians Came Here to Bury Their Dead*, Anchor Bay Beacon, December 28, 1983. It is probable that the French settlers who moved into the area in the 18th century gave Au Vase Creek its name because they had discovered the pottery fragments at this site.

[9] *Anchor Bay Watershed Management Plan*, *supra* at vi.

[10] *Id.* at 3.

[11] One hundred and seventeen fish species are found in Anchor Bay. The bay is also a major resting and breeding ground for migratory waterfowl, including the canvasback duck, mallard, black duck, Canada goose, and tundra swan. *Id.*

Macomb and St. Clair counties as well as many visitors from throughout the United States and Canada.[12]

14,000 years ago the Anchor Bay watershed was covered by Lake Maumee, which was formed from the melt waters of a glacier.[13] As the glacier retreated, Lake Maumee gradually diminished and exposed large areas of former lake bottom. Today, the coastal terrain of Lake St. Clair is mostly flat clay lake plain crossed by low sandy ridges – the ancient beaches of Lake Maumee. Sugarbush Road, located to the south and east of Petitioners' wetland, runs along the crest of one of these pre-historic beaches.

In 1800, Lake St. Clair was ringed with coastal wetlands and a wide variety of wetland and upland natural communities.[14] Over the next century and a half however, virtually all of the coastal marshes and most of the wetland areas along the Lake's tributaries were destroyed.

Anchor Bay area was cleared and drained for agriculture in the 19th century. Today, the Anchor Bay watershed area is rapidly urbanizing. Population in the Anchor Bay watershed is projected to increase by 40 per cent between 2000 and 2030. Households are expected to increase by 58 per cent.[15]

[12] *Id.* at 1.

[13] Great Lakes Commisison, *Lake St. Clair Coastal Habitat Assessment* (2004) at 8.

[14] See *Exhibit* 2, 1800 Michigan Natural Features Inventory Map of Macomb County Vegetation circa 1800.

[15] *Anchor Bay Watershed Management Plan*, *supra* at vii.

Although current water quality in Anchor Bay is good, increased imperviousness and decreases in wetlands, woodlands, and open fields associated with urban development can be expected to harm Anchor Bay and its tributaries by increasing flow quantity, sediment, nutrients, bacteria, and chemical contaminants, and by decreasing available habitat for fish and wildlife.[16]

Increasing impervious surfaces degrades water quality by causing increased peak flows of storm water, accelerating erosion, and decreasing natural drainage and infiltration capacity.[17] Excessive erosion and sedimentation result in changes to stream morphology, increased turbidity, increased pollutant loading, and destruction of streambed wildlife habitat. Accelerated soil erosion and sedimentation is an especially significant problem in the Lake St. Clair watershed because the underlying soils are heavy clay. Heavy clay soils tend to remain in suspension and are difficult to remove with conventional sedimentation techniques.[18] Loss of wetland habitats and native fish populations has been identified as a major concern for fish management in Lake St. Clair.[19]

Macomb County has taken a leading role in protecting the waters of the County and of Lake St. Clair. In 1994 serious water quality problems, including high bacteria counts and excessive weed growth, forced county swimming

[16] *Lake St. Clair Coastal Habitat Assessment* (2004), *supra* at 8.

[17] *Anchor Bay Watershed Management Plan*, *supra* at 5.

[18] *Anchor Bay Watershed Management Plan*, *supra* at 11.

[19] *St. Clair River and Lake St. Clair Comprehensive Management Plan*, *supra* at 7-135.

beaches to close most of the summer. Aware that the degraded state of water quality was having a serious impact on the local economy,[20] the County formed the Blue Ribbon Commission on Lake St. Clair to develop a plan of action to marshal international, state, and local efforts to protect the lake and its tributaries.

In 1997 the Blue Ribbon Commission issued a report containing 93 specific recommendations, including among others the creation of an organization to serve as a permanent advocate for the County's lakes and rivers, and continued enforcement of environmental laws by the County Prosecutor's Office. Later that year the Macomb County Commission authorized the creation of the Macomb County Water Quality Board and the Water Quality Unit of the Macomb County Environmental Prosecutor's Office. Today the Macomb County Water Quality Board advises the County Commission regarding water quality-related issues, recommends policy initiatives and regulatory actions, and serves as a public forum for addressing water quality issues of concern to Macomb County. The Water Quality Unit of the Macomb County Prosecutor's Office provides civil and criminal enforcement of water-quality related environmental laws and regulations in Macomb County, and in addition takes a significant role in developing water-quality related environmental policies and programs in Macomb County and in southeast Michigan.[21]

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[20] *Macomb County Blue Ribbon Commission on Lake St. Clair, Report and Recommendations*, August 28, 1997 at 2.

[21] The Macomb County Prosecutor's Office is the only county prosecutor's office in Michigan that has a unit exclusively dedicated to enforcing environmental laws.

Other Macomb County Departments have also developed significant roles and responsibilities for protecting Lake St. Clair and its tributaries. The Macomb County Health Department monitors surface water quality on a weekly basis at over 50 locations throughout the county including the Lake. The Health Department's Surface Water Improvement and Monitoring (SWIM) Team investigates suspected sources of water pollution on an ongoing basis and works with the prosecutor to correct violations of the county sanitary code and state laws. The Macomb County Planning and Economic Development Department recently drafted a series of model environmental protection ordinances, including a model wetland ordinance, to help local communities develop environmentally sound land use plans and policies. The Health Department, Planning Department, Prosecutor's Office, and Public Works Department collaborate in regional water quality planning initiatives such as the sub-watershed management plans being developed under Michigan's storm water management permitting program, and the Macomb/St. Clair Inter-County Watershed Management Advisory Group, the steering committee for implementing the St. Clair River and Lake St. Clair Comprehensive Management Plan.

Protecting Lake St. Clair and its tributaries is critical to the economic future of the County. Recognizing this, county leaders have developed a management structure and directed substantial county resources to the task of protecting the Lake and its tributaries. A decision to narrow or eliminate Clean Water Act jurisdiction over non-navigable wetlands and tributaries that are adjacent to traditionally navigable waters would undermine efforts to protect water quality in Macomb County. For these reasons, Macomb County has a direct and substantial interest in the outcome of this case.

II. SUMMARY OF THE ARGUMENT

Petitioners' wetland is adjacent to tributaries of Au Vase Creek, a navigable water that empties into Lake St. Clair. Since the wetland is separated from the ditch only by a man-made berm, it is subject to Corps of Engineers regulations defining waters of the United States to include wetlands adjacent to tributaries of navigable waters.

The federal government cannot adequately protect the navigable waters of the Au Vase Creek, Anchor Bay, and Lake St. Clair from contamination or impairment without having the authority to regulate non-navigable tributaries and wetlands adjacent to these waters. Since the Clean Water Act Amendments of 1972 were intended to restore the chemical, physical, and biological integrity of the nation's waters, it is reasonable to conclude that the Corps of Engineers possesses the authority to regulate adjacent wetlands and tributaries including wetlands separated from tributaries by man-made barriers. 33 C.F.R. 328(a)(7) (1999).

Wetland loss in Macomb County has degraded water quality in Lake St. Clair and its traditionally navigable tributaries. Petitioners' wetland provides important aquatic habitat and water storage functions to the Anchor Bay watershed. If Petitioners' wetland is destroyed there will be increased risks of harm to the navigable waters of Au Vase Creek, Anchor Bay, and Lake St. Clair. Petitioners' wetland is thus "inseparably bound up" with navigable waters of the United States.[22]

[22] Macomb County supports Respondents' argument that Section 404(a) of the federal clean water act does not violate the Commerce Clause of Article III of the United States Constitution. Macomb County

(Continued on following page)

III. ARGUMENT

A. PETITIONERS' WETLAND IS SUBJECT TO CORPS OF ENGINEERS REGULATIONS BECAUSE IT IS ADJACENT TO TRIBUTARIES OF TRADITIONALLY NAVIGABLE WATERS

Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

United States Army Corps of Engineers regulations define "waters of the United States" to include, among other waters "wetlands adjacent" to waters used or susceptible to use in interstate or foreign commerce, or to tributaries of such waters. See 33 C.F.R. 328.3(a)(1), (6) and (7). The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring," including "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c).

Petitioners own a triangular-shaped parcel of land located about one mile from the Lake St. Clair shoreline.[23] Over 80% of the parcel (15.96 acres out of the total 19.61 acres) is a forested wetland. A ditch runs along and within

believes that any further argument the County could offer on that issue would be merely cumulative to the arguments and authority presented by the Parties and therefore not particularly helpful to this Court. Accordingly, the argument in this amicus brief addresses only the issue of the scope of federal regulatory authority under Section 404(a) of the federal clean water act.

[23] *Exhibit* 3, attached.

Petitioners' southwest to northeast property line (the "hypotenuse of the triangle")[24] through what the record of this case establishes is also wetland terrain.[25] The ditch enters the Sutherland-Oemig Drain near the northeast corner of the property, and it is also connected to other ditches southwest of the property.[26] The Sutherland-Oemig Drain and the other ditches empty into Au Vase Creek, which in turn empties into the Anchor Bay area of Lake St. Clair. Lake St. Clair and the Au Vase Creek upstream to the Jefferson Avenue bridge are "navigable waters of the United States" subject to Section 10 of the River and Harbors Act of 1899. See 33 C.F.R. 329.16.[27]

It is unclear from the record when the ditch was constructed and for what purpose. Petitioners' consultant and Corps of Engineers personnel have speculated that the ditch may have been dug as long as 50-60 years ago in connection with the construction of the Sebille Manor military base housing project. See e.g., *Petitioner's Brief In*

[24] It is not clear from the record of this case how far the ditch extends. It crosses Petitioners' property line near Donner Road and runs entirely within Petitioners' property 1,800 feet until it joins the Sutherland-Oemig Drain a short distance northeast of Petitioners' northern property line. *Exhibit* 4, attached.

[25] See Corps of Engineers Administrative Appeal Decision of March, 5, 2001 at pp. 2-3.

[26] *Id.* at p. 3.

[27] *Navigable Michigan Waters of the United States, U.S. Army Corps of Engineers Detroit District*, February 10, 2000, at p. 22. Under Section 10, navigable waters of the United States are waters that are, have been, or are susceptible for use to transport interstate or foreign commerce. 33 C.F.R. 329.4. The Au Vase has a colorful history of use in foreign commerce. It was a popular landing spot for bootleggers smuggling liquor across Lake St. Clair from Canada during the prohibition era. Trinity, *The Heritage of Chesterfield*, The Richmond Review, September 13, 1967.

Support of Petition for a Writ of Certiorari at p. 4. This speculation is off the mark. The ditch and berm were actually constructed 33 and a half years ago in connection with a sanitary sewer project. In the spring of 1972 Chesterfield Township extended a 15" sanitary force main from an existing line west of Petitioners' property to the northwest along Petitioners' property line to a lift station. The line continues as a 24" line from the lift station northwest along Petitioners' property line underneath the Sutherland-Oemig Drain to its junction with another sewer line east of Petitioners' property.[28] The Township's contractor excavated the ditch to drain runoff from the construction road and the lift station construction site.[29] The project had nothing to do with the Sebille Manor subdivision, which had been built years earlier.[30]

Petitioners must have been aware of this sewer construction project, because they acquired the property prior to 1972.[31] Indeed, the Township's plans show that the

[28] See *Exhibits* 5A and 5B, *Township of Chesterfield Sanitary Sewer As Built Plans dated 7-8-72.*

[29] Pers. Conv. With Joseph Gajewski, Chesterfield Township Water and Sewer Department, December 13, 2005. Mr. Gajewski has worked for the Township Water and Sewer Department since 1970 and personally recalls the project. He also stated that the Township had originally intended that the construction road would be the permanent service road providing access to the lift station. However, the road proved unserviceable due to the wet, marshy terrain and the Township quickly abandoned it. The Township now services the lift station from a short road connecting to a nearby subdivision. *Id.*

[30] See *Exhibit* 6, an aerial photo taken in 1956, and *Exhibit* 7, an aerial photo taken in 1962, establish that the Sebille Manor subdivision was constructed between 1956 and 1962.

[31] Petitioners' attorney has stated that Petitioners had acquired the property in 1969. *Wetland Application Hearing Tr. at p. 11.* The earliest instrument showing Petitioners' interest in the property recorded in the

(Continued on following page)

sewer, lift station, and road were all constructed within an easement located within Petitioners' property line.

In short, the ditch and the earthen berm running along the western edge of the ditch were constructed by a Township contractor for the purpose of dewatering the sewer easement area. The ditch was excavated to drain the lift station area and the construction road running to it. The earthen berm was created to prevent water from the adjacent wetlands from flooding the ditch and overflowing into the construction area. Since the ditch was excavated in wetland, the nearby sewer was installed in an area that in all probability was also a wetland. The entire project would almost certainly have required a clean water act permit if current Corps of Engineers regulations had been in effect in 1972.[32]

The lower courts were absolutely correct in concluding that Petitioners' wetland is adjacent to a tributary of a navigable water subject to regulation under 33 C.F.R. 328.3(a)(7).

Macomb County Register of Deeds is a warranty deed dated July 5, 1971 showing Petitioners Keith A. Carabell and Harvey Gordenker as grantees. See *Exhibit* 8, attached. This deed contains no reference to any earlier conveyances of the property involving Petitioners.

[32] See *Exhibit* 7, 1962 *Aerial Photo*, and *Exhibit* 9, *National Wetland Inventory (MNFI) Map*. The photo and the map show that the area where the sewer was constructed was part of a larger wetland complex that covered both sides of the Sutherland-Oemig Drain and included Petitioners' property. There is no reason not to conclude that the sewer was constructed in (and resulted in the destruction of) wetland that was connected to the Sutherland-Oemig Drain prior to 1972.

B. THE FEDERAL CLEAN WATER ACT AUTHORIZES THE CORPS TO REGULATE PETITIONERS' WETLAND

Petitioners' central claim is that the Clean Water Act does not authorize federal regulation of wetland that is not physically connected to traditionally navigable waters because such wetlands lack "a meaningful connection to the Nation's navigable waters." *Petitioners' Brief* at p. 14. This argument is fatally flawed for at least two reasons: first, it is flatly contradicted by the previous decisions of this Court; second, it has absolutely no support in the facts of this case.

This Court has repeatedly held that Clean Water Act jurisdiction over waters of the United States extends beyond traditionally navigable waters to include non-navigable wetlands adjacent to navigable rivers, streams, and other conventionally identified waters. *United States v. Riverside-Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985),[33] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*").

In *Riverside-Bayview, supra*, this Court found that the Clean Water Act Amendments of 1972 were enacted to protect the integrity of aquatic ecosystems by controlling discharge of pollutants at their source, and that Congress had recognized that broad federal authority was needed to

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[33] The *Riverside-Bayview* case also involved a wetland located in Macomb County. The respondent in *Riverside-Bayview* owned an 80 acre low-lying marshy area near Lake St. Clair. The marshy area is adjacent to Black Creek, a navigable waterway. 474 U.S. at 131, 106 S.Ct. at 461.

accomplish this. "[I]n keeping with these views," this Court concluded, "Congress chose to define the waters covered by the act broadly." *Id.* at 474 U.S. 133, 106 S.Ct. 462.

As this Court recognized in the *SWANCC* decision, the scope of federal jurisdiction over non-navigable waters depends on the nexus between traditionally navigable waters and non-navigable waters. *SWANCC, supra* at 167, 680, see also *Riverside-Bayview, supra* at 132, 462. The nexus between navigable waters and non-navigable waters is clearly an ecological nexus arising from the statutory purpose of protecting the water quality and ecological integrity of navigable waters. In *Riverside-Bayview, supra*, this Court held that the clean water act authorized the Corps of Engineers to regulate adjacent wetlands based on its "ecological judgment about the relationship between waters and their adjacent wetlands." *Id.* at 134, 463.

Although the *Riverside-Bayview* decision applied only to non-navigable wetland that directly abutted traditionally navigable waters, the reasoning of that decision applies with equal force to non-navigable tributaries and wetlands adjacent to non-navigable tributaries of traditionally navigable waters. The *Riverside-Bayview* opinion noted that the Corps has determined that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality" since they may, among other things "filter and purify water draining into adjacent bodies of water and slow the flow of surface runoff into lakes, rivers, and streams and thus

prevent flooding and erosion." *Id.*[34] The Corps reached a strikingly similar conclusion with respect to the Petitioners' wetland, finding that it "provides valuable seasonal habitat for aquatic organisms" and "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Au Vase Creek, and Lake St. Clair." *Letter from Lt. Col. Richard J. Polo Jr., October 5, 2000,* at p. 1.

If the Clean Water Act authorizes the Corps to regulate non-navigable waters on the basis of its judgment concerning the waters' ecological relationship to navigable waters, and if the Corps has found, as here, that activities in the non-navigable waters may influence the water quality and ecological integrity of traditionally navigable waters, the conclusion is inescapable that the non-navigable waters such as Petitioners' wetland can be federally regulated. *SWANCC, supra*; *Riverside-Bayview, supra*. Such regulation reflects the Corps professional judgment that the non-navigable waters are "'inseparably bound up with the 'waters' of the United States.'" (cite omitted), *SWANCC, supra*.

Indeed, the Corps' conclusions regarding the relationship between Petitioners' wetlands and Au Vase Creek and Lake St. Clair have never been seriously disputed by Petitioners. Instead, Petitioners hang their hats on the proposition that the Clean Water Act cannot regulate waters that lack a "hydrological connection" to "federal"

[34] This Court expressed no opinion regarding the authority of the Corps to regulate wetlands that are not adjacent to bodies of open water. *Id.* at 474 U.S. 131-132, F.n. 8, 106 S.Ct. 461.

waters. *Petitioners' Brief* at p. 29. This assertion has no support in law or fact and is utterly wrong.

First, there is no requirement for a hydrological connection in the language of the Clean Water Act or its administrative regulations. In fact, the Corps administrative definition of waters of the United States specifically includes waters having no hydrological connection. See 33 C.F.R. 328.3(c), *supra*.

Second, Petitioners' assertion is contrary to the controlling decisions of this Court. In *Riverside-Bayview* this Court held – unanimously – that the Corps was authorized to regulate a wetland that abutted a navigable water but had no direct hydrological connection to that water. The Corps' determination that the abutting wetland was "inseparably bound up" with navigable waters was not unreasonable, in light of the history and purpose of the act, because the Corps had concluded that wetlands "may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands." *Id.* at 474 U.S. 131, 106 S.Ct. 461.[35] See also *SWANCC*, *supra* at 176, 685 F.n. 2 (Stevens, dissenting).

Third, the *SWANCC* decision provides no support for Petitioners' argument. *SWANCC* involved an abandoned gravel pit that had gradually filled with water and become

[35] In ruling that the wetland was an adjacent wetland, this Court effectively sustained the Corps definition of "adjacent" waters ("bordering, contiguous, or neighboring" including "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c). Obviously this definition does not include any requirement for a hydrological connection to other regulated waters.

a migratory bird habitat. The sole basis asserted for federal jurisdiction in *SWANCC* was the "Migratory Bird Rule." This Court invalidated the Migratory Bird Rule because the Rule lacked the nexus with traditionally navigable waters required by the language of the Clean Water Act and because there was no history of Congressional acquiescence to the Rule. *SWANCC*, *supra* at 170, 682.[36]

The flooded gravel pit in *SWANCC* was wholly isolated from navigable waters, not adjacent to navigable waters as in *Riverside-Bayview* or adjacent to tributaries of navigable waters as the wetlands are in this case. The majority opinion in *SWANCC* distinguished *Riverside-Bayview* on the basis that Congress had clearly acquiesced to the regulations pertaining to adjacent wetlands, in contrast to the Migratory Bird Rule, which was issued as an administrative interpretation years later. The regulations upheld in *Riverside-Bayview* are an earlier version of, and substantially identical to, the regulations relied upon by the Corps in this case.

In sum, Petitioners' assertion that "*Riverside-Bayview* and *SWANCC* establish . . . that wetlands have a significant nexus with the navigable waters when . . . at a minimum, they have a hydrological connection via ground or surface water with the navigable waters of the United States" (*Petitioners' Brief* at pp. 28-29) is simply not true. What this Court ruled instead is that "the breadth of federal regulatory authority contemplated by the Act" authorizes the Corps to exercise its "ecological judgment"

[36] The Corps has specifically disavowed any reliance on the Migratory Bird Rule in asserting jurisdiction over Petitioners' wetland.

about the relationship between non-navigable waters and navigable waters, and to regulate the former on the basis of that judgment. See *Riverside-Bayview*, *supra* at 134, 463. Indeed, Petitioners' insistence that a "significant" nexus must include a direct hydrological connection amounts to a request for this Court to substitute its own judgment of what is ecologically significant for that of the Corps; to disregard the Congressional intention to restore and maintain the ecological integrity of the nation's waters by broadening federal jurisdiction under the Clean Water Act Amendments of 1972; and to return the scope of federal jurisdiction over the nation's waters to the approximate dimensions of the Rivers and Harbors Act of 1899.[37]

Petitioners' invitation to undo the Clean Water Act should be rejected by this Court.

C. ELIMINATING CLEAN WATER ACT JURISDICTION OVER WETLANDS NOT DIRECTLY CONNECTED TO TRADITIONALLY NAVIGABLE WATERS WOULD HAVE A SERIOUS IMPACT ON EFFORTS TO PROTECT THE WATERS OF LAKE ST. CLAIR

Petitioners' claim that federal jurisdiction is limited to wetlands featuring a direct hydrological connection to traditionally navigable waters has serious implications for the waters of Macomb County and Lake St. Clair. If this Court rules in Petitioners' favor, it is likely that federal jurisdiction over most Macomb County wetlands will be eliminated. This would seriously harm efforts to protect

[37] 33 U.S.C. § 403.

the navigable waters of the County and of Lake St. Clair from pollution and impairment.

Virtually all remaining wetland areas in Macomb County have been drastically impacted by human activity. The huge wetland areas that existed at the time of European settlement have been dredged, filled, and drained in piecemeal fashion. Most wetlands in contemporary Macomb County exist as the result of previously drained farm fields reverting to their natural state. The remaining wetlands are widely fragmented because they are separated by roads, subdivisions, drains, and ditches.

The history of Petitioners' land is typical of the pattern of development in the County. At the time of European settlement, Petitioners' property was part of a large hardwood swamp that extended all the way to the lakeshore.[38] Wetland destruction in the vicinity accelerated beginning in the middle of the 19th century. Available Macomb County records indicate the Sutherland-Oemig Drain was constructed sometime prior to 1895, at a time when the land in the vicinity was being farmed.[39]

Most of Petitioners' property was cleared and drained for farming, probably after the Civil War. Aerial photographs indicate the property was mostly clear of trees until the early 1960s.[40] After farming ceased in the area,

[38] See *Exhibit* 2, *1800 MNFI Vegetation circa 1800 of Macomb County*.

[39] Pers. Conv. With Kelly Kaufman, Macomb County Department of Public Works, December 6, 2005.

[40] See *Exhibit* 6, *1956 Aerial Photo*, and *Exhibit* 7, *1962 Aerial Photo*. These photos show that Petitioners' land was clear of trees except in the northeast corner as late as the early 1960s. It is probable

(Continued on following page)

the terrain on Petitioners' land began to revert to its natural state. By the late 1970s, Petitioners' property was part of a larger wetland complex approximately 80 acres in size.[41] This wetland complex consisted of palustrine forested and scrub-shrub wetland areas covering both sides of the Sutherland-Oemig Drain. Since then, the area has become increasingly urbanized, and most of the larger wetland area around Petitioners' property has once again disappeared.

In short, Petitioners' wetland is not "virgin territory." It was cleared, drained, and farmed for many decades. Its hydrology has been dramatically altered by dredging, filling, and draining activity within and nearby its location.

Some may argue that wetlands such as Petitioners' are not worth saving because they are not "pristine." Macomb County contends that it is critical to protect the wetlands remaining in the County precisely *because* there are so little of them left.[42] Pristine or not, the remaining wetlands still provide the benefits identified by Congress when it passed the Clean Water Act Amendments of 1972. If wetlands continued to disappear, stream bank erosion and habitat degradation are bound to worsen. Water

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that the treed area in the northeast corner is a remnant of the original swamp that covered the area.

[41] See *Exhibit* 9, *National Wetland Inventory Map, New Haven Quadrangle.* The United States Geological Survey National Wetland Inventory Maps were prepared from available data in 1978.

[42] It is estimated that only 8 per cent of the land area in Michigan within 10 miles of Lake St. Clair is wetland. This land area was once largely dominated by coastal and inland wetlands. *Lake St. Clair Coastal Habitat Assessment* (2004), *supra* at 59.

quality will gradually continue to deteriorate despite government efforts to eliminate illegal discharges of pollution and to upgrade existing pollution control facilities.

Despite all of the harm done to it over the past 150 years, Petitioners' wetland still functions to protect the ecological integrity of Au Vase Creek and, ultimately, Lake St. Clair. As the Corps of Engineers found, Petitioners' wetlands continue to provide valuable benefits to the local aquatic ecosystem, including flood prevention, surface water storage and pre-treatment, and aquatic habitat.[43] These wetland functions help protect the navigable waters of Au Vase Creek and Anchor Bay from becoming degraded by excessive runoff, increased erosion, and biological and chemical contamination.

The fact that Petitioners' wetland does not directly abut navigable waters but instead is adjacent to non-navigable tributaries of navigable waters does not negate its ecological relationship to the Creek and the Lake. As the Corps found, Petitioners' wetlands play a valuable role in protecting the traditionally navigable waters of the Creek and the Lake even though they lack such a connection.

Forcing the Corps of Engineers to draw fine distinctions between regulated and non-regulated wetlands based on surface or sub-surface hydrology would impose enormous new administrative burdens on the Corps. Imposing this new requirement would require the Corps to perform costly and time-consuming investigations to document, on

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[43] Approximately 50% of Petitioner's property is in the 100 year and 500 year floodplain of the Sutherland-Oemig Drain. See *Exhibit* 10, *1974 Federal Flood Insurance Map.*

a case-by-case basis, the presence or absence of hydrological connections. Such investigations would have little or nothing to do with protecting navigable waters. Since so many County wetlands have been altered by human activities, it is likely that hydrological connection standard would render the Clean Water Act ineffective in Macomb County by excluding too many wetlands from regulation.

In addition, such a requirement would open the door to new efforts to evade the law. Property owners would be tempted to construct barriers between wetlands and open waters in order to avoid federal regulation. Such a new rule would also create unwarranted distinctions between regulated and unregulated wetland based on who severed the hydrological connection and/or when the separation occurred.

To illustrate, suppose Petitioners' themselves had excavated the ditch and constructed the earthen berm in, say, 1992 and had then claimed their wetlands were no longer under federal jurisdiction? No administrative tribunal or court would have taken such a claim seriously. Indeed, civil or criminal proceedings might have been initiated to compel the restoration of any wetland areas that had been harmed or destroyed.

Should the actual circumstances be treated any differently? Petitioners at least acquiesced to a construction project that severed the connection between their remaining wetland and other waters.[44] Now they contend that this project just happened to have eliminated federal

[44] Macomb County is not suggesting Petitioners' had any real choice in the matter.

jurisdiction over their wetland in the bargain.[45] In effect, then, Petitioners are asking this Court to rule that their wetland is not regulated merely because the hydrological separation occurred long ago as a result of actions by other persons.

The Clean Water Act cannot be interpreted to allow self-interested parties opportunities to nullify – with as little effort as a signature granting a utility easement – federal jurisdiction over otherwise regulated waters. This Court surely recognizes that nothing in the Clean Water Act supports the notion that federal authority over waters of the United States turns on *when* waters were separated from other waters or *who* effected the separation. In realty, the Clean Water Act says nothing about hydrological connections at all. Instead, the Act authorizes the federal government to regulate non-navigable waters as necessary in order to protect traditionally navigable waters.

IV. CONCLUSION

A decision holding that the Clean Water Act regulates only wetlands that have a direct hydrological connection to navigable waters would utterly frustrate the central purpose of the Act – to protect and restore the ecological integrity of the waters of the United States. Rolling back federal authority over adjacent wetlands would also seriously undermine Macomb County's efforts to protect

[45] This Court may take judicial notice of the public information presented with this Brief. FRE 201. Even if this Court chooses to disregard the evidence regarding the sewer project presented here, however, the record of this case clearly shows that the only thing that prevents water from flowing from Petitioners' wetland to the Sutherland-Oemig Drain is a man-made object – the earthen berm.

Lake St. Clair and its tributaries, an effort that is absolutely critical to the economic and social well-being of the County. For these reasons, Macomb County respectfully urges this Court to rule that Petitioners' wetland is regulated under the Clean Water Act because it is adjacent to tributaries of the navigable waters of Au Vase Creek and Lake St. Clair.

Respectfully submitted,

ERIC J. SMITH
Macomb County Prosecuting Attorney
MARK A. RICHARDSON
Macomb County Assistant Prosecuting
Attorney for Water Quality
One South Main Street, 3rd Floor
Mt. Clemens, Michigan 48043
(586) 469-5350
Attorneys for Amicus Curiae Macomb County Michigan

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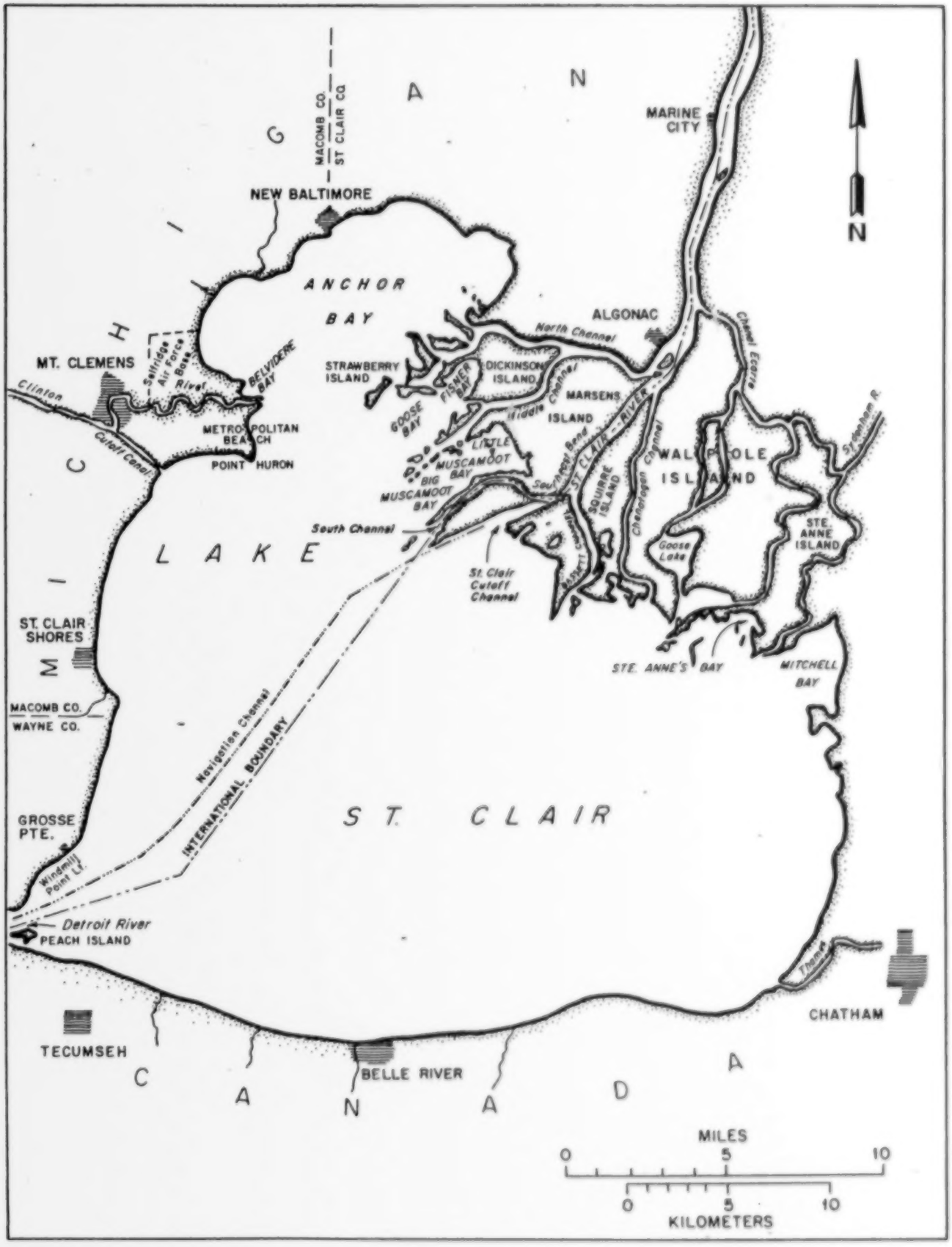
EXHIBIT 1



Contemporary Lake St. Clair, the St. Clair Delta, and tributaries.

EXHIBIT 2

Vegetation circa 1800 of Macomb County, Michigan

An Interpretation of the General Land Office Surveys

By P. J. Comer and D. A. Albert
Michigan Natural Features Inventory
1997

SOURCE: Comer, P.J., D.A. Albert, H.A. Wells, B.L. Hart, J.B. Raab, D.L. Price, D.M. Kashian, R.A. Corner, D.W. Schuen (Map Interpretation) R.B. Austin, T.R. Leibfried, K.M. Klemoch, L. Prange-Gregory, J.D. Bohlinq, C.J. DeLain, L.J. Scrimger. (Digital Map Production). 1995. Michigan's Presettlement Vegetation, as Interpreted from the General Land Office Surveys 1816-1856. Michigan Natural Features Inventory, Lansing, MI. Digital Map.

Michigan DNR
Department of Natural Resources
Wildlife Division

MICHIGAN STATE UNIVERSITY EXTENSION

Michigan Natural Features Inventory

Scale 1:50,000

Miles

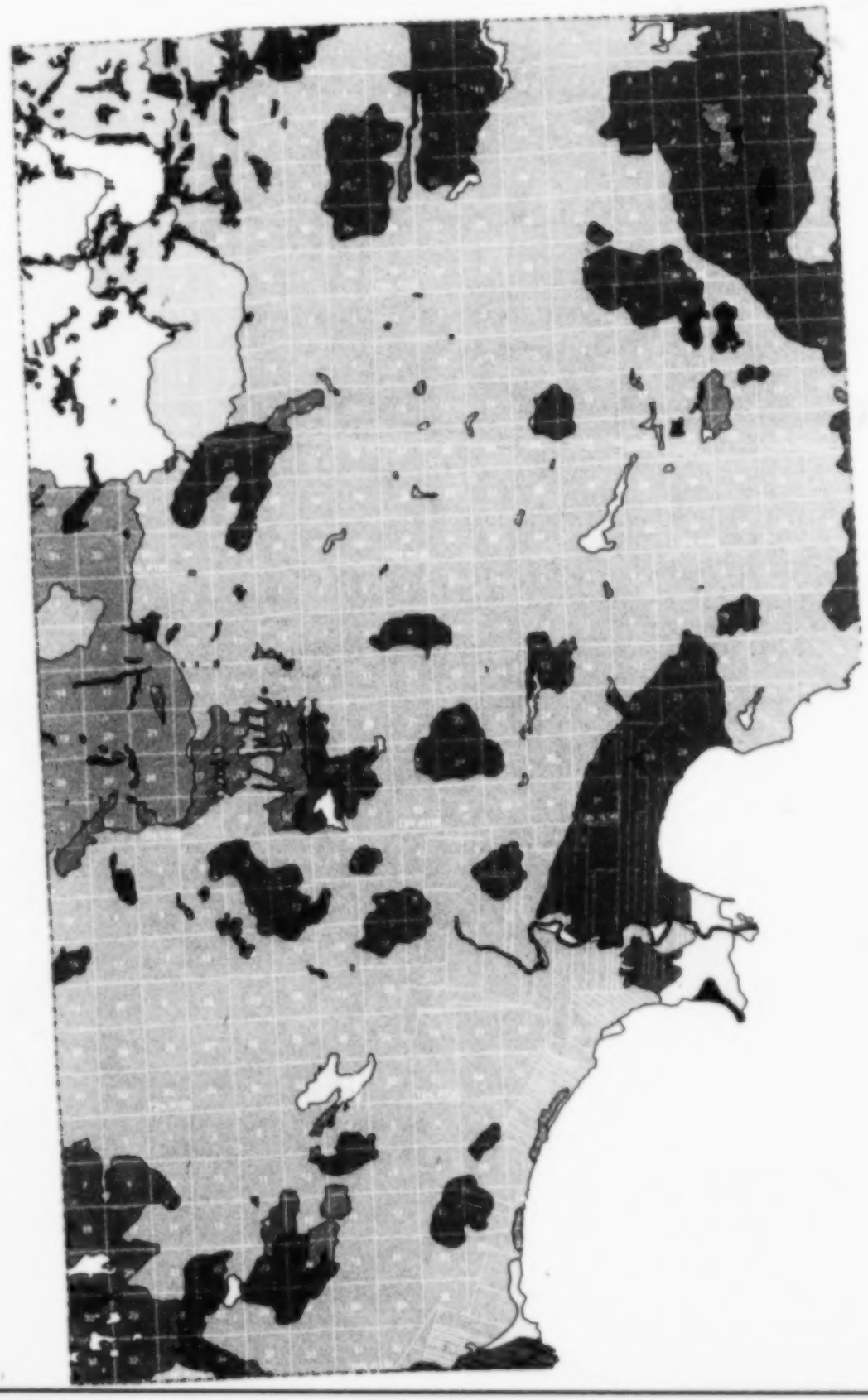
Kilometers

Map Projection: Lambert Conformal Conic

Legend

- ASPEN-BIRCH FOREST
- ✓ BEECH-SUGAR MAPLE FOREST
- BEECH-SUGAR MAPLE-HEMLOCK FOREST
- ✓ BLACK ASH SWAMP
- ✓ BLACK OAK BARREN
- ✓ CEDAR SWAMP
- GRASSLAND
- HEMLOCK-WHITE PINE FOREST
- HEMLOCK-YELLOW BIRCH FOREST
- JACK PINE-RED PINE FOREST
- ✓ LAKE/RIVER
- ✓ MIXED CONIFER SWAMP
- ✓ MIXED HARDWOOD SWAMP
- ✓ MIXED OAK FOREST
- ✓ MIXED OAK SAVANNA
- MIXED PINE-OAK FOREST
- ✓ MUSKEG/BOG
- ✓ OAK-HICKORY FOREST
- OAK-PINE BARREN
- PINE BARREN
- ✓ SAND DUNE
- ✓ SHRUB SWAMP/EMERGENT MARSH
- SPRUCE-FIR-CEDAR FOREST
- ✓ WET PRAIRIE
- WHITE PINE-MIXED HARDWOOD FOREST
- WHITE PINE-RED PINE FOREST
- WHITE PINE-WHITE OAK FOREST

✓ = LAND COVER TYPE PRESENT ON THIS MAP



Site Location Map

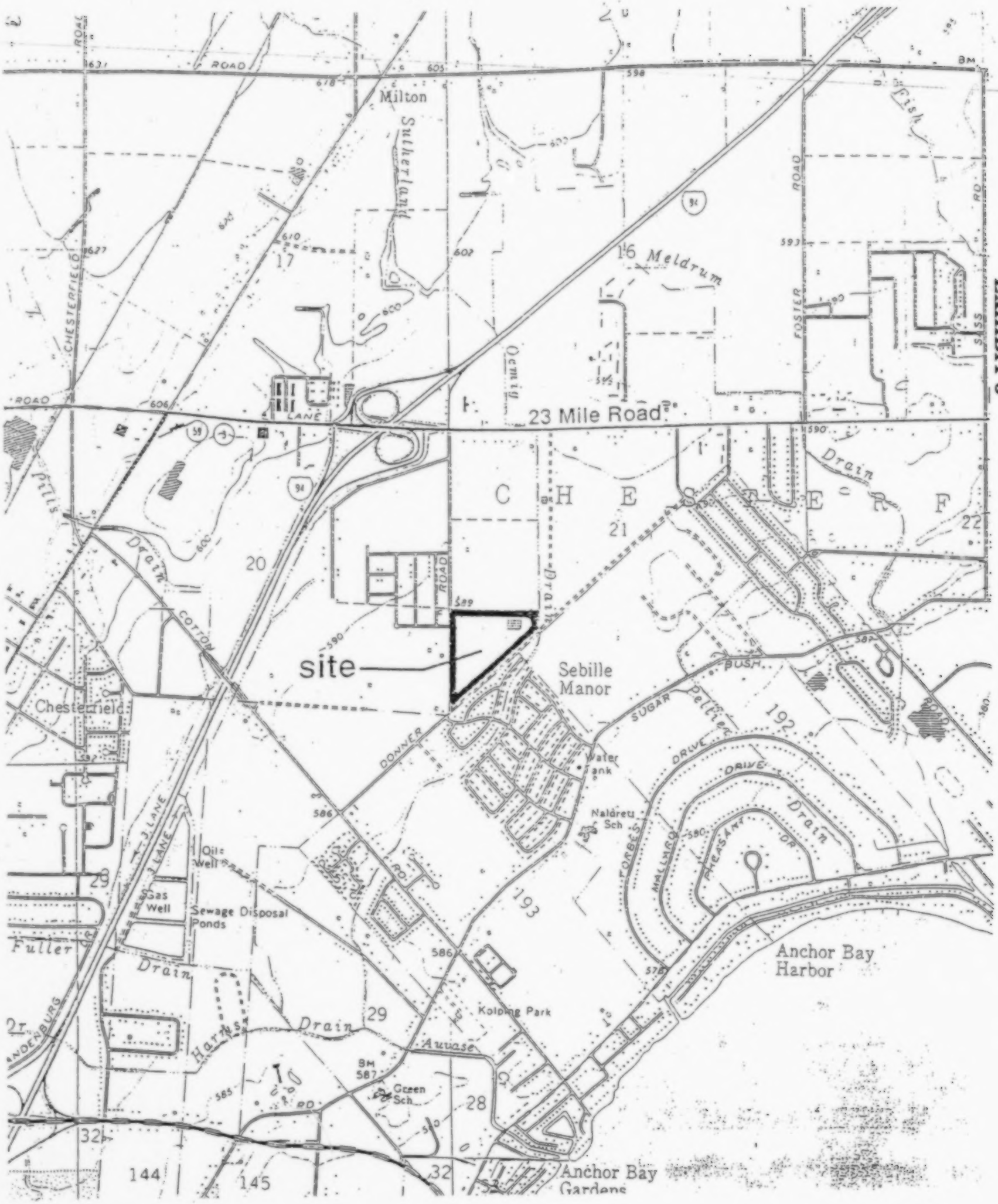
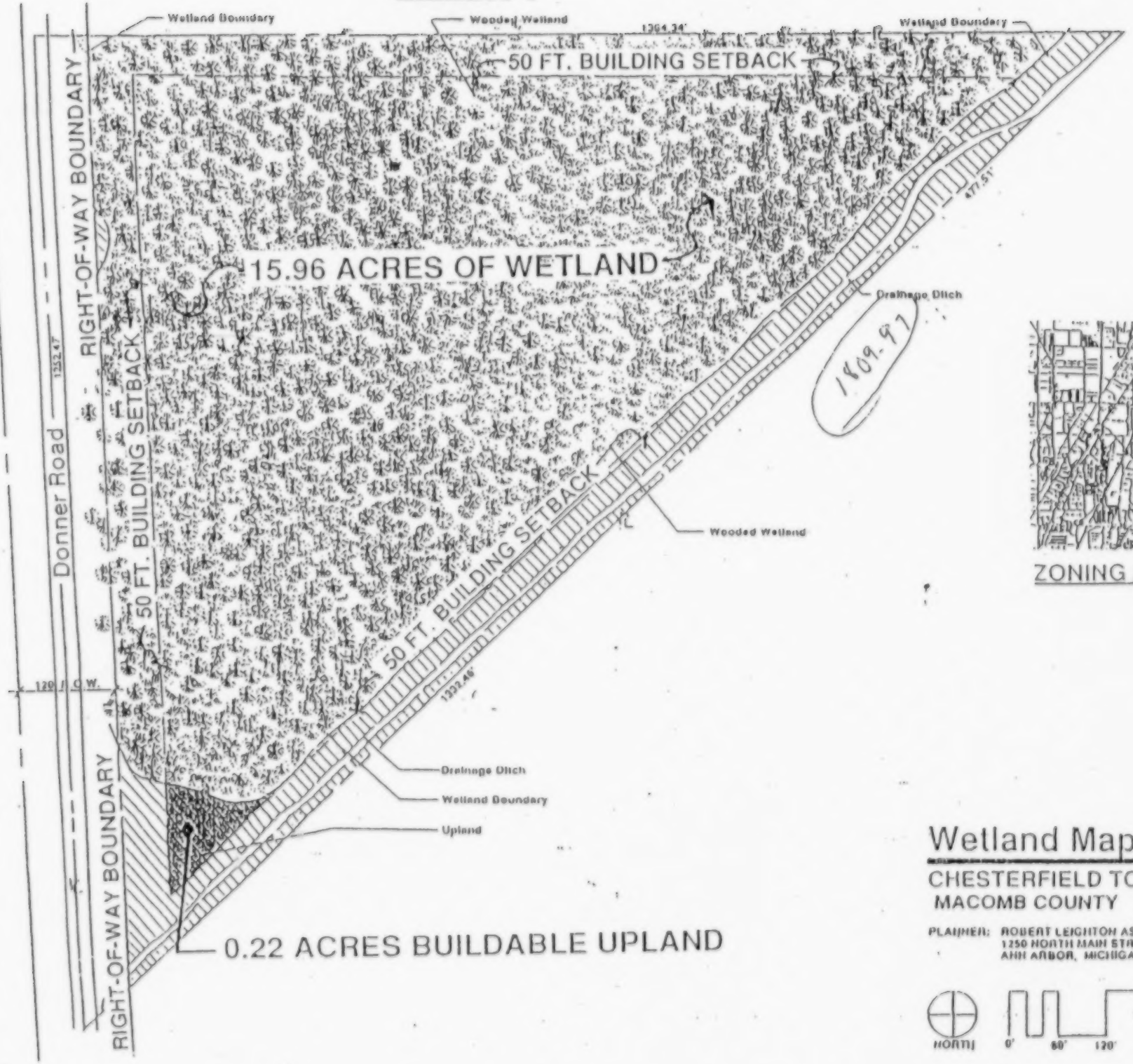


EXHIBIT 3

App. 3

EXHIBIT 4



ZONING / LOCATION MAP
NOT TO SCALE

Wetland Map

CHESTERFIELD TOWNSHIP
MACOMB COUNTY MICHIGAN

PLANNER: ROBERT LEIGHTON ASSOCIATES, INC.
1250 NORTH MAIN STREET
ANN ARBOR, MICHIGAN 48104

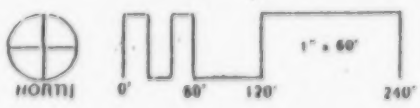


EXHIBIT 5A

Chesterfield Township As Built Sewer Plan

[Blue Print Reproduction In Pocket On Inside Back Cover]

EXHIBIT 5B

Chesterfield Township As Built Sewer Plan

[Blue Print Reproduction In Pocket On Inside Back Cover]

EXHIBIT 6

1956 1 inch equals 1,000 feet

1962 1 inch equals 1,000 feet

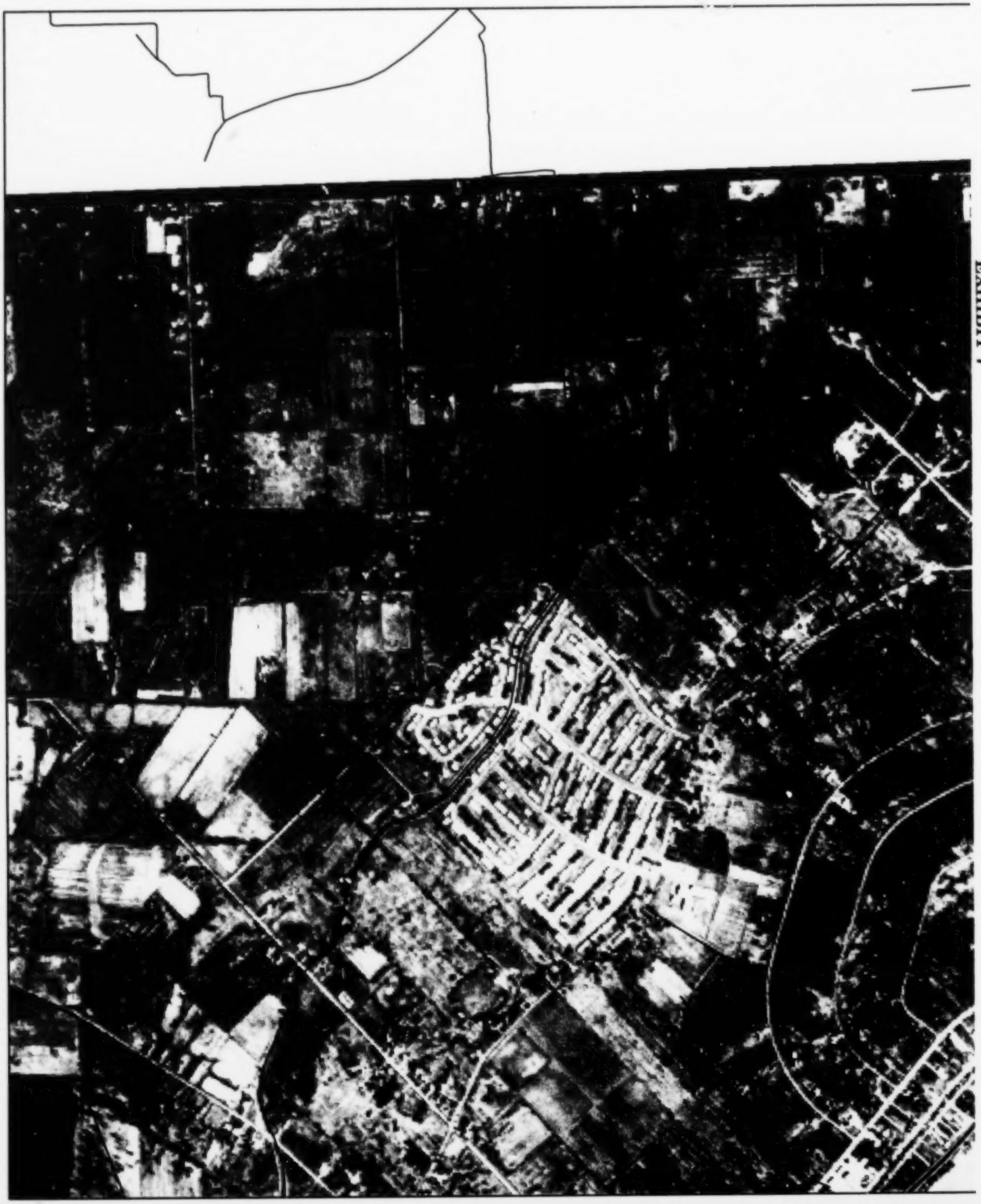


EXHIBIT 7

WARRANTY DEED—Statutory Form
Act. 187 P.A. 1881 - M.S.A. 26.571

LIBER 2662 PAGE 471

Furnished by AMERICAN TITLE INSURANCE COMPANY

A347293

KNOW ALL MEN BY THESE PRESENTS: That James A. Michael and Jacqueline D. Michael, husband and wife, Joseph Michaels and Thelma Michaels, husband and wife, and Charles R. Towner and Marian G. Towner, husband and wife,
whose Street Number and Post Office address is 37965 North Bonkay Drive, Mount Clemens, Michigan

Convey and Warrant to Robert Piersol, Keith A. Carabell, Stanton P. Bocknek, Harvey Gordenker and Robert Palmer
whose Street Number and Post Office address is 10 South Broadway, Mount Clemens, Michigan

the following described premises situated in the Township of Chesterfield, County of Macomb and State of Michigan, to-wit:

Town 3 North, Range 14 East of Section 21, commencing at the northwest corner of Section 21, thence south 0 degrees 36' west 3016.99 feet to the point of beginning; thence south 0 degrees 36' west 1252.47 feet, thence north 49 degrees 18' east 1332.46 feet; thence north 49 degrees 53' east 477.51 feet; thence north 86 degrees 49' west 1365.34 feet to the point of beginning; containing 19.52 acres of land, more or less. Subject to the rights of the public and of any governmental unit in any part thereof taken, used or deeded for street, road or highway purposes.

EXHIBIT 8

PARCEL NUMBER 9 9 21 301 002

App. 9

RECORDED IN MACOMB COUNTY RECORDS AT: 11:01 A.M.

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or [illegible] MAR 3 1976 [illegible] 3-3-76

for the sum of Seventy Thousand and no/100 ($70,000.00) Dollars.

Edna Michael
CLERK - REGISTER OF DEEDS
MACOMB COUNTY, MICHIGAN

subject to easements and restrictions of record.
Accompanying this deed is a warranty deed from Zenith Steel & Metal Co. which is also part of the selling group who were all purchasers under a land contract from Mr. and Mrs Antonios Katakis.

Dated this 5th day of July, A.D. 19 71

Signed and Sealed in Presence of:

Susan H. Grant
Susan H. Grant

Elaine M. Viccars
Elaine M. Viccars

MAR-3'75 77.00 P.B. 10845

Signed and Sealed:

James A. Michael (L. S.)
James A. Michael

Jacqueline D. Michael (L. S.)
Jacqueline D. Michael

Joseph Michaels - Thelma Michaels
Joseph Michaels Thelma Michaels

Marian G. Towner
Marian G. Towner

Charles R. Towner (L. S.)
Charles R. Towner

In the STATE OF MICHIGAN, COUNTY OF MACOMB ss.

On this 5th day of July, A. D. 19 71 before me personally appeared James A. Michael, Jacqueline D. Michael, husband and wife, Joseph Michaels, Thelma Michaels, husband and wife and Charles R. Towner and Marian G. Towner, husband and wife to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My commission expires January 25th, A. D. 1975.

Susan H. Grant
Susan H. Grant
Notary Public Macomb County, Michigan

*Print typewrite or stamp name under signature

County Treasurer's Certificate

This is to certify that [illegible] County Treasurer's records there are no tax liens on this property and that taxes are paid for five years previous to date of this instrument except 19 [illegible] 2266

Date [illegible] NOT EXAMINED MAR 2 1976

ADAM E. NOWAKOWSKI, Macomb County Treasurer, Per [illegible]

This certification does not include current taxes now being collected

City Treasurer's Certificate

Person who drafted this instrument

Charles R. Towner
Two Crocker Blvd.
Mt. Clemens, Mich.

Recording Fee

Transfer Tax 77.00

When recorded return to

Dank, Peterson and Hay, P.C.
Nine South Gratiot Avenue
Mount Clemens, Michigan #8043

TITLE INSURANCE — ESCROWS ALL OF (C 365B)

BEST AVAILABLE COPY

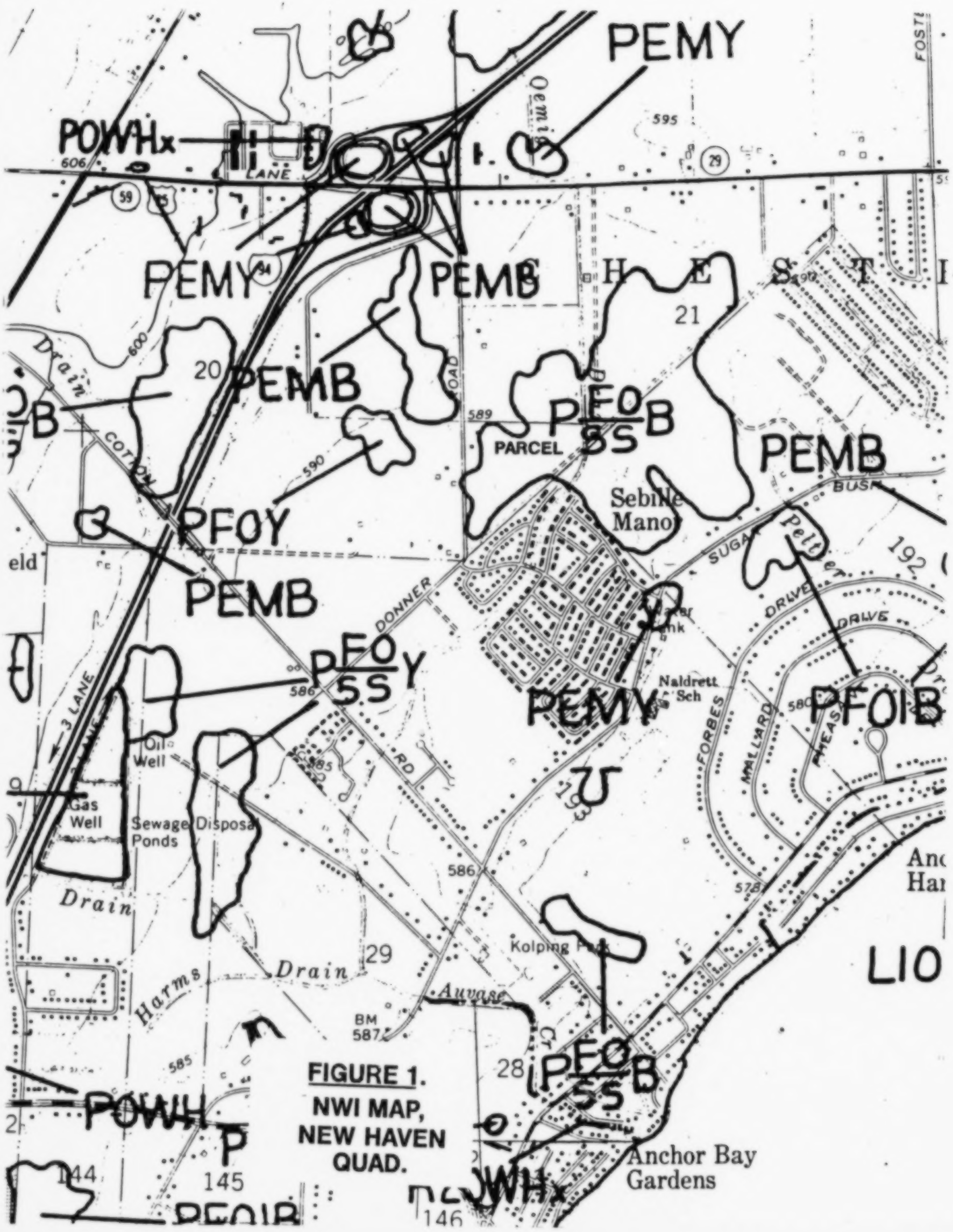
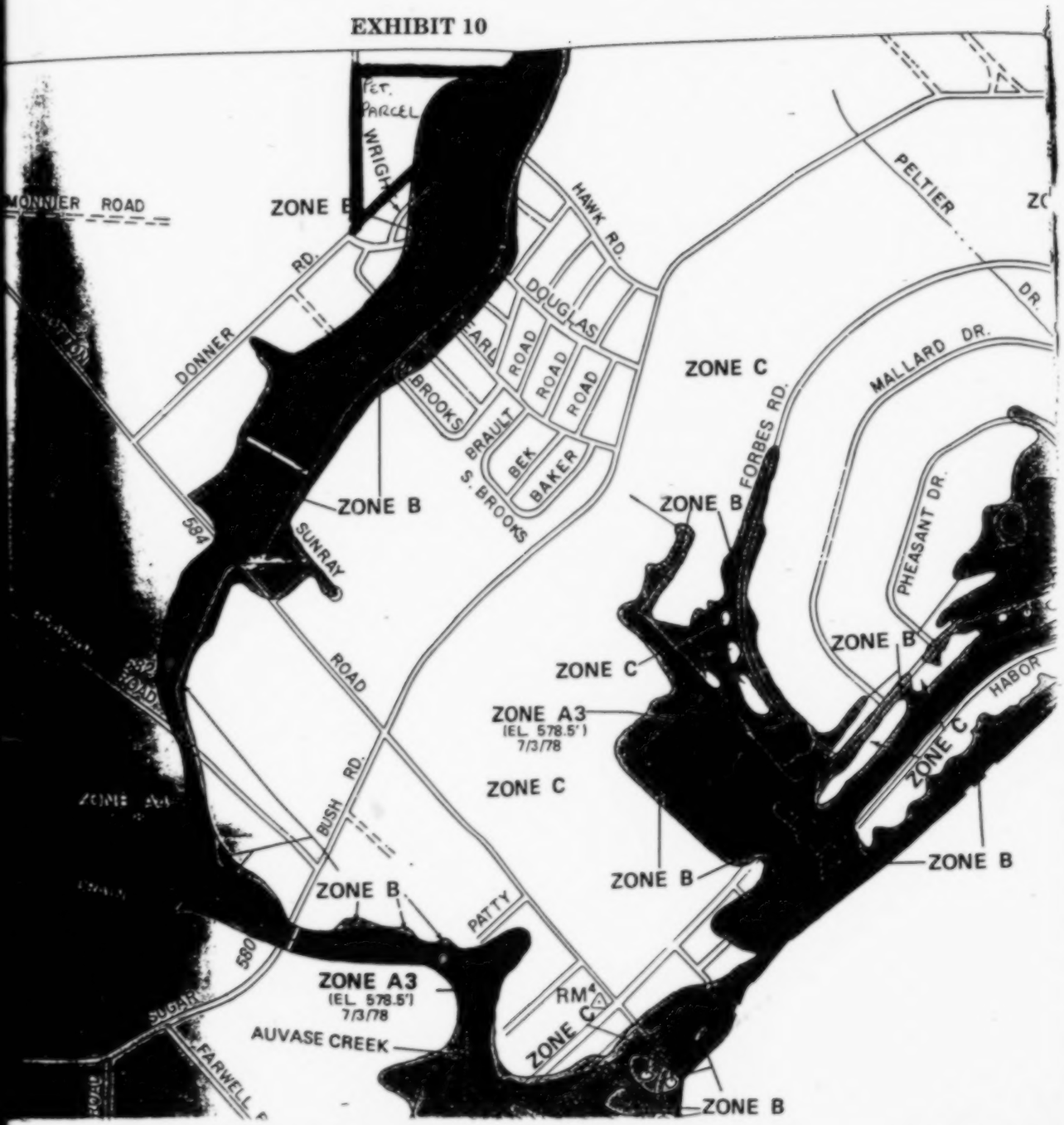


FIGURE 1.
NWI MAP, NEW HAVEN QUAD.

EXHIBIT 10



KEY TO MAP

500-Year Flood Boundary ——→

100-Year Flood Boundary ——→

Zone Designations* With Date of Identification e.g., 12/2/74

100-Year Flood Boundary ——→

500-Year Flood Boundary ——→

Base Flood Elevation Line With Elevation In Feet** — 513

Base Flood Elevation In Feet Where Uniform Within Zone** (EL 987)

Elevation Reference Mark $RM7_X$

River Mile • M1.5

**Referenced to the National Geodetic Vertical Datum of 1929

*EXPLANATION OF ZONE DESIGNATIONS

ZONE	EXPLANATION
A	Areas of 100-year flood; base flood elevations and flood hazard factors not determined.
A0	Areas of 100-year shallow flooding where depths are between one (1) and three (3) feet; average depths of inundation are shown, but no flood hazard factors are determined.
AH	Areas of 100-year shallow flooding where depths are between one (1) and three (3) feet; base flood elevations are shown, but no flood hazard factors are determined.
A1-A30	Areas of 100-year flood; base flood elevations and flood hazard factors determined.
A99	Areas of 100-year flood to be protected by flood protection system under construction; base flood elevations and flood hazard factors not determined.
B	Areas between limits of the 100-year flood and 500-year flood; or certain areas subject to 100-year flooding with average depths less than one (1) foot or where the contributing drainage area is less than one square mile; or areas protected by levees from the base flood. (Medium shading)
C	Areas of minimal flooding. (No shading)
D	Areas of undetermined, but possible, flood hazards.
V	Areas of 100-year coastal flood with velocity (wave action); base flood elevations and flood hazard factors not determined.
V1-V30	Areas of 100-year coastal flood with velocity (wave action); base flood elevations and flood hazard factors determined.

NOTES TO USER

Certain areas not in the special flood hazard areas (zones A and V) may be protected by flood control structures.

This map is for flood insurance purposes only; it does not necessarily show all areas subject to flooding in the community or all planimetric features outside special flood hazard areas.

For adjoining map panels, see separately printed Index To Map Panels.

INITIAL IDENTIFICATION
JUNE 28, 1974

CONVERSION TO REGULAR PROGRAM

C3544ZA

C3544I

C5044ZA

DONJER ROAD

DONJER ROAD

C5656
44-1

09-

PROPOSED 25' PERMANENT EASEMENT

PROP. 25' CONSTRUCTION EASEMENT

15" SAN.

15" SAN.

15" SAN.

15" SAN.

15" SAN.

C583

C582

C580-A & 581

2 | 3

2 | 3

℄ STA.

TOP OF CURB ELEV.

590

585

580

575

570

565

570

585

580

575

570

310'AB

311'AB

311'AB

310'AB

287'AB

PROPOSED 15" MAIN MAIN

OPEN CUT CONSTRUCTION ACROSS DONNER ROAD

EX 15" SAN.

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

SECTION MAP CODE	35-7 | 35-8
55	320
SEQUENCE NUMBER	

EXISTING SAN. SEWER
EXISTING STORM SEWER
EXISTING WATER MAIN
EXISTING GAS MAIN
EXISTING OR UNDERGROUND
EXISTING OVERHEAD UTILITY
FENCE
MANHOLE
WELL AND WELL
PROP. SAN. SEWER & MANHOLE
PROP. STORM SEWER & MANHOLE
PROP. WATER MAIN, HYDRANT & GATE VALVE & WELL
PROP. CATCH BASIN - PAVEMENT TYPE
PROP. CATCH BASIN - SEAWAY TYPE

SECTION OR CENTER LINE

REVISIONS
PLANS PREPARED FOR BIDDING 11-16-71
ADDENDUM NO.1 6-16-72
AS-BUILT PLANS 7-8-75

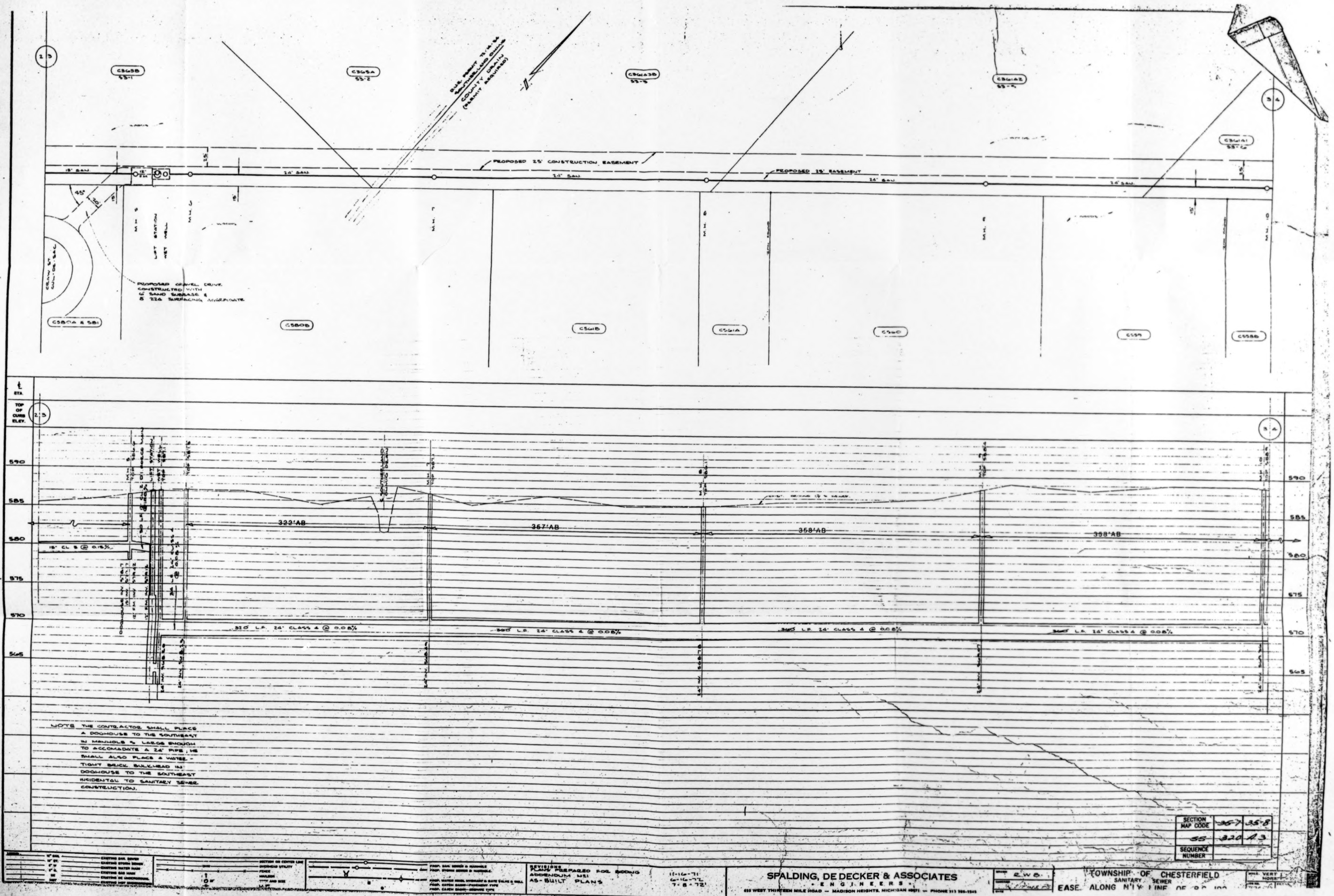
SPALDING, DEDECKER & ASSOCIATES
ENGINEERS
555 WEST THIRTEEN MILE ROAD — MADISON HEIGHTS, MICHIGAN 48071 — PHONE 313 585-5545

R.W.B.
11-15-71

TOWNSHIP OF CHESTERFIELD
SANITARY SEWER
EASE. ALONG N'LY. LINE OF P.C. 193
FROM DONNER RD. TO 1500' N.E.

BEST AVAILABLE COPY

No. 04-1384
Carabell v. US Army Corps of Eng'rs
Amicus Curiae Brief
EXHIBIT 5A



NOTE THE CONTRACTOR SHALL PLACE A DOGHOUSE TO THE SOUTHEAST IN MANHOLE # 5 LARGE ENOUGH TO ACCOMADATE A 24" PIPE. HE SHALL ALSO PLACE A WATER-TIGHT BRICK BULKHEAD IN DOGHOUSE TO THE SOUTHEAST INCIDENTAL TO SANITARY SEWER CONSTRUCTION.

SECTION MAP CODE	35-7	35-8
55	320	A 3
SEQUENCE NUMBER		

EXISTING SAN. SEWER
EXISTING STORM SEWER
EXISTING WATER MAIN
EXISTING GAS MAIN
EXISTING OE UNDERGROUND
SECTION OR CENTER LINE
OVERHEAD UTILITY
FENCE
MANHOLE
TYPE AND SIZE
W.F.
PROP. SAN. SEWER & MANHOLE
PROP. STORM SEWER & MANHOLE
PROP. WATER MAIN, HYDRANT & GATE VALVE & WELL
PROP. CATCH BASIN - PAVEMENT TYPE
PROP. CATCH BASIN - GROWTH TYPE

REVISIONS
PLANS PREPARED FOR BIDDING 11-16-71
ADDENDUM #2 6-16-72
AS-BUILT PLANS 7-18-72

SPALDING, DE DECKER & ASSOCIATES
• ENGINEERS •
655 WEST THIRTEEN MILE ROAD — MADISON HEIGHTS, MICHIGAN 48071 — PHONE 313 588-9545

DRAWN E.W.S.
CHECKED

TOWNSHIP OF CHESTERFIELD
SANITARY SEWER
EASE. ALONG N'LY LINE OF S.D. 100

SCALE: HORIZ. 1" = 50' VERT. 1" = 5'

No. 04-1384
Carabell v. US Army Corps of Eng'rs
Amicus Curiae Brief
EXHIBIT 5B

Nos. 04-1034 and 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS, JUDITH A. NELKIE RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, and PINE RIVER BLUFFS ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, and FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
RONALD W. OPSAHL
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable, intrastate wetlands that do not abut a navigable water?

2. Whether extension of the Clean Water Act jurisdiction to every nonnavigable, intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceeds Congress's constitutional power to regulate commerce among the States?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act, are implemented and enforced in a manner consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole, or in part, and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The federal government's imposition of jurisdiction purportedly in accordance with the Clean Water Act may not extend to nonnavigable, intrastate wetlands that do not abut navigable waters. Further, extension of jurisdiction to every nonnavigable, intrastate wetland with even the most tenuous or remote of hydrological connections exceeds Congress's constitutional powers to regulate commerce among the States. One of a State's traditional roles includes the right to regulate land use within the State.

Historically, States have employed their authority over land use to regulate uses that would affect wetlands. In fact, long before enactment of the Clean Water Act, many States had passed laws to regulate land use in wetland areas. Indeed, despite the encroachment on States' traditional roles by the federal government, States continue to regulate wetlands. As a result, the removal of the unconstitutional imposition of federal jurisdiction over nonnavigable, intrastate wetlands would result in little, if any, gap in wetland protection, as States resume primary enforcement of land use.

Moreover, given this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the federal government's inclusion of nonnavigable, intrastate wetlands within the definition of "waters of the United States" is unreasonable and not entitled deference. To extend jurisdiction to these wetlands exceeds Congress's authority under the Commerce Clause, and therefore

cannot be a reasonable interpretation of the Clean Water Act's definition of "waters of the United States."

ARGUMENT

Petitioners are accused of filling wetlands on their properties without a federal permit in purported violation of section 404 of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1344. The properties at issue entail nonnavigable, intrastate wetlands that do not abut navigable waters, but instead are separated, by distances ranging from approximately one mile to as far as 20 miles, from the nearest navigable water. Despite that these remote wetlands are not adjacent to waters of the United States and have only an attenuated, if any, connection to navigable waters, the federal government has asserted jurisdiction over Petitioners' properties under section 404 of the CWA.

To the detriment of private landowners and in conflict with the authority of the States to regulate lands within their borders, the federal government has employed an expansive interpretation of its jurisdiction over "waters of the United States."[2] The federal government now interprets

[2] On its face, CWA section 404 requires landowners to obtain a permit from the United States Army Corps of Engineers in order to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a). "Navigable waters" has been defined by Congress as "waters of the United States, including the territorial seas." *Id.* § 1362(7). In regulation, the Corps of Engineers has defined "waters of the United States" to include waters that are navigable in fact, waters subject to tidal forces, all interstate waters including interstate wetlands, and *all other waters "such as intrastate . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce."*

(Continued on following page)

its jurisdictional authority under the CWA to include "adjacent waters" of "wetlands" where the only nexus between the "wetlands" and navigable waters is the mere presence of some purported "hydrological connection." *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004). Such an expansive interpretation of the CWA has never been sustained by this Court and was soundly rejected in *SWANCC*. 531 U.S. 159 (2001). Moreover, the federal government's interpretation of its jurisdictional authority under the CWA raises serious constitutional questions and creates a distinct conflict among the Courts of Appeals and confusion among administrative agencies. *See In re Needham*, 354 F.3d 340 (5th Cir. 2003) (reading *SWANCC* broadly to limit the CWA to navigable and non-navigable waters that directly abut navigable waters); *FD & P Enters., Inc. v. United States Army Corps of Eng'rs*, 239 F.Supp.2d 509 (D.N.J. 2003) (same); *but see Rapanos*, 376 F.3d 629 (6th Cir. 2004) (interpreting *SWANCC* narrowly to hold that the CWA reaches inland waters that purportedly share a hydrological connection with navigable waters); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407 (4th Cir. 2003) (same); *United States v. Rueth Dev. Co.*, 334 F.3d 598 (7th Cir. 2003) (same); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (same).

One of the most fundamental principles of America's system of government is the protection of "historic spheres of state sovereignty from excessive federal encroachment." *Gonzales v. Raich*, ___ U.S. ___, 125 S.Ct. 2195, 2220

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33 C.F.R. § 328.3(1)(a) (emphasis added); *see also* 40 C.F.R. § 122.2 (providing the Environmental Protection Agency's definition of "waters of the United States," which is substantially identical to 33 C.F.R. § 328.3(1)(a)).

(2005) (O'Connor, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). It is well established that the core police powers of the States always have included the authority to protect the health, safety, and welfare of their citizens. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977). Included within the basic, fundamental functions of State and local governments is the power to regulate land use planning and zoning. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"), *see SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . .."). However, when a federal regulation infringes on traditional State functions, that regulation is inherently suspect, as Chief Justice Marshall noted:

> Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.

United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805).

In its brief, *Amicus* MSLF will demonstrate that not only has regulation of wetlands historically been a function of State and local governments, but also such regulation continues to be exercised by State and local governments, despite the encroachment of federal regulation upon their sovereign functions. Further, although

administrative agencies are given deference in interpreting the statutes in their charge, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-845 (1984), the agency's interpretation must not be "arbitrary, unreasonable, or manifestly contrary to the statute." *Id.* at 843-844. The authority Congress grants the agency to interpret its statutes cannot exceed in scope the powers granted Congress by the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Because the federal government's interpretation of the CWA, extending jurisdiction to wetlands with the slimmest of purported "hydrological connections" to navigable waters, is an impermissible reading of the CWA, and because federal jurisdiction over such waters exceeds Congress's constitutional powers, this Court should reverse the decisions of the Sixth Circuit Court of Appeals and hold that the CWA does not reach these nonnavigable, intrastate wetlands.

I. STATES HISTORICALLY HAVE REGULATED, AND CONTINUE TO REGULATE, WETLANDS DESPITE FEDERAL ENCROACHMENT UPON STATE SOVEREIGN POWERS.

The 1969 Cuyahoga River fire, in part, led to the enactment of the Clean Water Act. *See, e.g.*, Drew Caputo, *A Job Half Finished: The Clean Water Act after 25 Years*, 27 Envtl. L. Rep. 10574, 10576 (1997). However, long before that fire, throughout the 1950s and 1960s, State and local governments had recognized the importance of environmental quality and had adopted first generation environmental controls. Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 Case W. Res. L. Rev. 93, 95 (2004); N. William Hines, *Nor Any Drop to*

Drink: Public Regulation of Water Quality, 52 Iowa L. Rev. 186, 234 (1966); William L. Andreen, *The Evolution of Water Pollution Control in the United States–State, Local, and Federal Efforts, 1789-1972: Part I*, 22 Stan. Envtl. L.J. 145, 191 (2003). "The regulation of wetlands, particularly when nonpolluting activities are involved, entail the regulation of a myriad of ordinary land uses, from building homes to filling ditches, and so on. . . . As such, the regulation of wetlands is a traditional state function, much like zoning. Thus, it should be no surprise that literally thousands of local governments regulate the use and modification of wetlands." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 36 (1999); Jon A. Kusler, *Federal, State, and Local Government Roles and Partnerships for Fair, Flexible, and Effective Wetland Regulation* 1 (Ass'n of State Wetland Managers 1994).

In fact, years before the United States District Court for the District of Columbia "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution," *Natural Res. Def. Council v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975), in 1963, Massachusetts had enacted the Nation's first statute requiring a State permit before filling or dredging coastal wetlands. Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 Envtl. L. 519, 534 (1998). In 1965, inland wetlands were afforded protections under the State permit system, and, in 1972, regulations to protect floodplains were added. *Id.*; Mass. Gen. Laws ch. 131, § 40 (2004). By 1972, when Congress enacted the CWA, other States, including Connecticut,

Georgia, and Washington were enacting wetland protection statutes. Adler, *supra*, 29 Envtl. L. at 48. "Although Massachusetts was the first state to enact an explicit wetlands protection statute, many localities had already done so. The Massachusetts law was itself based on a number of local zoning permit requirements already to be found in coastal states." *Id.* (internal quotation omitted).

By 1975, when *Callaway* was decided, every coastal State, except Texas, had adopted coastal wetland protections of some kind, and eleven States had enacted statutes protecting freshwater wetlands as well. *Id.*; Jon A. Kusler, *State Wetland Regulation: Status and Emerging Trends* 1 (Ass'n of State Wetland Managers 1994). More importantly, fourteen of the fifteen States that have ten percent or more of their landmass covered by wetlands had enacted their first wetland protection laws by 1975. Adler, *supra*, 29 Envtl. L. at 49 ("Moreover, most of these states have some form of protections [sic] for both inland and coastal wetlands."). It was not until 1977 that Congress codified the *Callaway* decision expanding federal jurisdiction, and, even then, Congress stopped short of explicitly authorizing federal regulation of wetlands. Clean Water Act of 1977, Pub. L. 95-217 (1977) (codified as amended at scattered sections of 33 U.S.C.).

While many States had yet to enact wetland conservation statues before 1975, that fact alone is unpersuasive. "The mere existence of a federal regulatory program likely provides states with a substantial incentive not to regulate themselves. Once a federal program is in place, states are likely to devote their resources to other priorities, rather than duplicate the federal efforts." Jonathan H. Adler, *Swamp Rules: The End of Federal Wetland Regulation?* 22 Reg. 11, 14 (1999).

Despite the incentive not to act, many States enacted wetland conservation programs to supplement or augment federal efforts, or to protect wetlands beyond the reach of the federal government but well within the State and local government's authority regarding land use. Fifteen States have regulatory statutes protecting freshwater wetlands. In addition, other States protect wetlands through various programs and regulatory schemes, including shoreline or coastal zone protection programs. Adler, *supra*, 29 Envtl. L. at 50. Several States have even gone so far as to assume authority to enforce CWA section 404 permitting from the Corps of Engineers. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1261-1288 (1995). Other States have assumed authority over the regulation of isolated wetlands following this Court's decision in *SWANCC* through their CWA section 401 water quality certification programs. C. Victor Pyle, III, Note, *Isolated Wetlands Jurisprudence Post-SWANCC and Resulting Federal and State Attempts to Fill the Void*, 11 Southeastern Envtl. L.J. 91, 101-108 (2002). There is no reason to believe that States will discontinue their wetland programs if federal enforcement were not present; indeed, that States have continued to regulate wetlands, in the face of federal regulation, point to States' willingness and capability to enforce their own wetland conservation programs.

II. REMOVING FEDERAL REGULATION WILL NOT RESULT IN A SIGNIFICANT GAP IN WETLAND REGULATION.

The conventional wisdom holds that federal regulation is necessary because State efforts and nonregulatory initiatives are ineffective in safeguarding environmental values, resulting in a "race to the bottom." Adler, *supra*, 22 Reg. at 12. However, "[t]he history of wetland conservation efforts suggests that states were hardly the environmental laggards that many suppose." *Id.* at 12. As illustrated above, not only did many States begin to protect wetlands before the federal government, States continue to develop new approaches to wetland conservation. Additionally, there are substantial nonregulatory conservation efforts that show great promise in preventing the destruction of wetlands on private property. After all, more than seven percent of nonfederal land in the 48 contiguous States, nearly 111 million acres, is covered by wetlands, mostly in the eastern United States. Natural Resources Conservation Service, *National Resources Inventory – 2002 Annual NRI* (2004).

Where State regulatory programs have been established, they generally have slowed wetland destruction. Adler, *supra*, 29 Envtl. L. at 51. For example, since 1972 when Virginia enacted its first wetland protection statute, "documented alteration of [Virginia's] wetlands dropped dramatically . . . from over 500 to less than 20 acres per year." *Id.* Likewise, Maryland has reduced its annual wetland losses and has prevented far more wetland destruction than would have occurred under the CWA alone. *Id.* In fact, many States impose broader restrictions than the Corps of Engineers may under the CWA. In Maryland, "virtually any activity which may impact the

wetland is regulated under its wetland protection statute." *Id.* (internal quotation omitted). In addition, several States enforce sizable buffer zones protecting their wetlands, including New York's 100-foot buffer and Maryland's 25- to 50-foot buffer. *Id.*

Further, State and local wetland regulation is more likely to devote scarce resources to the greatest environmental concerns. "Federal regulators, regardless of their intentions or regulatory authority, are inherently limited in their ability to regulate wetlands." *Id.* at 53. Although there are more then 100 million acres of wetlands in the contiguous United States, fewer than 1,200 full-time Corps of Engineers employees are tasked with wetland regulation – approximately 90,000 acres per employee. *Id.* at 52-53. State and local regulators are better able to provide their local communities with the certainty, predictability, and equity that they seek. Virtually every State and local government maps wetlands as part of its regulatory process yet no federal jurisdictional maps are available to allow landowners to determine conclusively whether or not their properties are wetlands subject to federal jurisdiction. *Id.* at 53.

Since this Court's decision in *SWANCC*, several options have been proposed to close any gaps left in the regulation of isolated wetlands, including the proposal of a model State wetland statute created by the Association of Wetland Managers. Ass'n of State Wetland Managers, *Model State Wetland Statute to Close the Gap Created by SWANCC* (2001), *available at* http://www.aswm.org/swp/model-leg.pdf. This model statute could easily be modified to include the type of nonnavigable, intrastate wetlands at issue in the case at bar. Further, States without comprehensive wetland statutes could look to several other States

for examples of effective legislation. Therefore, there will be little lag time between the determination that the federal government lacks jurisdiction over the lands at issue in this case and the reestablishment of State protection efforts.

In addition to State and federal regulatory programs, several nonregulatory programs are available to protect wetlands. Beginning in the 1980s, Congress created a new generation of wetland conservation programs: the North American Waterfowl Management Plan in 1986, the United States Fish and Wildlife Service's Partners for Fish and Wildlife program in 1987, and the Natural Resource Conservation Service's Wetland Reserve Program in 1990. *See, e.g.*, United States Fish & Wildlife Serv., *North American Waterfowl Management Plan* (1986), *available at* http://www.fws.gov/birdhabitat/NAWMP/images/NAWMP.pdf. These three programs have "restored an estimated 160,000-plus acres of wetlands per year from 1992 through 1996, at the relatively low cost of $1,000 per acre or less." Adler, *supra*, 22 Reg. at 16; Adler, *supra*, 29 Envtl. L. at 56. In contrast, the cost of CWA section 404 mitigation projects "can reach as high as $30,000 per acre, not including the legal and other costs borne by the permit applicant." Adler, *supra*, 22 Reg. at 16.

Furthermore, private conservation efforts have proven very effective in wetland protection. For example, Ducks Unlimited, a private conservation group, restored or enhanced more then 50,000 acres of wetlands in 1994 alone. Adler, *supra*, 29 Envtl. L. at 59. The overall effect of national environmental groups, such as the Nature Conservancy, and local or regional groups, such as the Chesapeake Wildlife Heritage, a group focusing on wetland restoration projects in the Chesapeake Bay area, taken in

conjunction with the federal and State nonregulatory programs undoubtedly results in far greater wetland conservation then CWA section 404 possibly could. All tolled, State programs, nonregulatory federal programs, and private conservation efforts are quite capable of filling any perceived gap left after federal section 404 enforcement over nonnavigable, intrastate wetlands is held to be unconstitutional.

III. THE FEDERAL AGENCIES' DEFINITION OF "WATERS OF THE UNITED STATES" TO INCLUDE NONNAVIGABLE, INTRASTATE WETLANDS IS AN UNREASONABLE INTERPRETATION OF THE CLEAN WATER ACT AND IS NOT ENTITLED TO DEFERENCE.

When the terms of a statute are clear, courts provide little room for agency interpretation of those terms; however, when Congress delegates authority to enforce a statute to a governmental agency, while leaving some ambiguity in how the agency is to enforce the statute, courts should assume that Congress impliedly delegated the authority to interpret the ambiguity to the agency charged with administering the statute. *Chevron*, 467 U.S. at 843-845. Unless the agency's interpretation of the statute is "arbitrary, unreasonable, or manifestly contrary to the statute," the agency interpretation should be applied. *Id.* at 843-844. However, this Court has refused to grant *Chevron* deference to agency interpretations that raise significant constitutional questions, such as whether Congress had the power to regulate the waters at issue here under the Commerce Clause. *SWANCC*, 531 U.S. at 681-683.

As a result of the Court's ruling in *SWANCC*, the Sixth Circuit's reliance on *Chevron* deference is misplaced. *Rapanos*, 376 F.3d at 640-641. In *SWANCC*, this Court was presented with the question of whether the Corps of Engineers' regulation interpreting section 404, the very regulation at issue here, properly extended federal jurisdiction to intrastate waters used as habitat by migratory birds. 531 U.S. 159. In rejecting the Corps' arguments, this Court found the terms of the CWA clear, and limited the scope of federal jurisdiction to navigable waters or open waters and those waters, including wetlands, immediately "adjacent to open water." *Id.* at 168. Though it considered the government's argument that federal jurisdiction extended further, this Court determined that the plain "text of the statute will not allow this." *Id.* at 167-174. In *SWANCC*, this Court also determined that the exercise of CWA jurisdiction over nonadjacent wetlands would raise "significant constitutional questions" under the Commerce Clause and that Congress would not be deemed to have pushed the outer limits of its authority without a "clear indication" that it intended to do so. *Id.* at 172-174. Finding no such indication and, in fact a contrary indication, this Court invalidated CWA jurisdiction over nonadjacent wetlands. *Id.* at 174.

Despite this Court's decision in *SWANCC*, the federal government continues to assert jurisdiction under the CWA over nonnavigable, intrastate wetlands such as Petitioners' properties. Although some federal courts have decided that *SWANCC* was a limited ruling and have affirmed federal regulation of any wetland with any "hydrological connection" to navigable water, no matter how distant or tenuous the connection, *e.g. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Treacy v. Newdunn Assocs., LLP*,

344 F.3d 407 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 334 F.3d 598 (7th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), this Court's decision in *SWANCC* is clear: "In its decision, the Court . . . invalidates . . . the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *Id.* at 176-177 (Stevens, J., dissenting). Therefore, because the Corps' interpretation of "waters of the United States" is contrary to this Court's precedent in *SWANCC*, *Chevron* deference by the Sixth Circuit was misplaced and Petitioners' properties should have been found to not be within the jurisdiction of the CWA.

IV. THE FEDERAL AGENCIES' INTERPRETATION AND THE SIXTH CIRCUIT'S RULINGS, EXTENDING CLEAN WATER ACT JURISDICTION TO NONNAVIGABLE, INTRASTATE WETLANDS WITH ANY HYDROLOGICAL CONNECTION TO NAVIGABLE WATERS, EXCEEDS CONGRESS'S POWER UNDER THE COMMERCE CLAUSE AND INTRUDES ON TRADITIONAL STATES' RIGHTS.

The Sixth Circuit, in upholding the federal government's regulation of nonnavigable, intrastate wetlands on the Petitioners' properties, has misinterpreted the jurisdictional limitations of the CWA. The current federal regulations provide a very broad definition of "waters of the United States," encompassing wetlands adjacent to other bodies of water (other than waters that are themselves wetlands). 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Moreover, federal regulations are far more explicit in defining "adjacent" as "bordering, contiguous, or neighboring," and

"adjacent wetlands" as "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. § 328.3(c). Yet, the Sixth Circuit concluded that nonnavigable, intrastate wetlands on the Petitioners' properties are subject to federal control under the CWA because of the presence of a "hydrological connection" establishing a "significant nexus between the wetlands and 'navigable waters.'" *Rapanos*, 376 F.3d at 639; *Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 710 (6th Cir. 2004). The Sixth Circuit reached this conclusion despite acknowledging that the "wetlands" on the Petitioners' properties are not physically adjacent to, or directly abutting, any navigable water. If the federal government may regulate all waters with a purported hydrological connection to any navigable water, no matter how tenuous or remote the connection, there is virtually no land that the federal government may not regulate, and the Commerce Clause has no meaning as a limitation on Congress's power.

The Sixth Circuit's holdings disregard totally this Court's Commerce Clause jurisprudence, and will, if allowed to stand, permit the federal government to use the CWA to regulate private property in every State with no constitutional limit. Moreover, this broadening of federal jurisdiction under the CWA does not just limit the rights of landowners, it encroaches upon the very rights of the States themselves to regulate lands within their borders. Land use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state

activity"). Authority over these functions is reserved, traditionally, to the States under the Tenth Amendment. *See, SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . ..").

In *United States v. Lopez*, this Court suggested that, whenever Congress attempts to regulate areas traditionally regulated by State or local governments, including the rights of private property owners, this Court will review that legislation with caution. 514 U.S. 549, 557-568 (1995). Foretelling the scrutiny it would apply, this Court rejected, in *Lopez*, the "costs of crime" and "national productivity" justifications for the Gun-Free School Zones Act ("GFSZA") proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," and because such a broad reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561 n.3, 564, 567-568.

Likewise, in *SWANCC*, congressional authority under the Commerce Clause was tested. In *SWANCC*, this Court addressed whether EPA and the Corps could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." 531 U.S. at 163-164. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the CWA. *Id.* at 162-163.

Although the *SWANCC* decision did not decide whether federal regulation of nonnavigable, intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-173. This Court indicated that the Corps' regulation of isolated, intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional State and local function. *Id.* at 172-174. Even though previous rulings had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the CWA that Congress intended to give the federal government authority over isolated wetlands, this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Because local land use and private property rights are necessarily intertwined, this Court's holdings in *Lopez* and *SWANCC* control in this matter. The Sixth Circuit's extension of federal jurisdiction under the CWA to nonnavigable, intrastate wetlands that do not abut navigable water substantially intrudes on the rights of the Petitioners, as private landowners, and on the sovereign power of the State to control local land use. Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant to allow Congress to use the Commerce Clause as its basis for federal regulation in an "area of traditional state concern"

that "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and State authority would blur and political responsibility would become illusory." *Id.* at 577.

Accordingly, the Sixth Circuit's upholding of the federal government's regulation of nonnavigable, intrastate wetlands, such as the Petitioners' property, intrudes unconstitutionally on the rights of private landowners to use their land and the responsibilities of States to regulate local land use. The repercussions of such unbounded federal authority over "waters of the United States" are far-reaching and substantial.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court overturn the decisions of the Sixth Circuit and hold that the jurisdiction of the Clean Water Act does not reach nonnavigable, intrastate wetlands such as Petitioners' properties.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
**Counsel of Record*
RONALD W. OPSAHL
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

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JOHN A. RAPANOS, ET AL.

Petitioners,

v.

UNITED STATES,

Respondent

JUNE CARABELL, ET AL.

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs of Certiorari to
The United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

Duane J. Desiderio
(Counsel of Record)
Thomas J. Ward
Felicia K. Watson
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 220,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulations under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and, unfortunately, has witnessed numerous situations where federal regulators have exercised their authority beyond the CWA's limits. NAHB has thus been before the Court as *amicus curiae* in the cases listed in Appendix A ("App. 1a") to this brief, involving landowners who have been aggrieved by over-zealous regulation under the CWA and other statutes and programs.

SUMMARY OF ARGUMENT

(1) ***Point Sources are not Navigable Waters:*** The Court of Appeals ruled that ordinary drainage ditches at the *Rapanos* and *Carabell* sites are "navigable waters." Moreover, in *Carabell* the ditches drain into, or are part of, a municipal storm sewer system which has been permitted under CWA Section 402 to control pollutant discharges.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

Congress intended ditches and storm sewers to be regulated as "point sources," not as "navigable waters," and the Court of Appeals should be reversed accordingly.

(2) ***Adjacent to "Open Waters":*** This Court has held that wetlands are subject to the CWA if they are immediately adjacent to "open water." The Court of Appeals should be reversed because it stretched the CWA to reach wetlands immediately adjacent to "point sources."

(3) ***"Significant Nexus" Should Consider Downstream Impact:*** This Court has established the principle that the CWA covers non-navigable features with a "significant nexus" to navigable-in-fact water. A "significant nexus" inquiry in any given case is highly fact sensitive and must consider whether upstream activity in a non-navigable feature causes tangible impact on downstream navigable-in-fact waters.

ARGUMENT

I. DITCHES, MUNICIPAL STORM SEWER SYSTEMS, AND OTHER POINT SOURCES ARE NOT CWA "NAVIGABLE WATERS."

The CWA's regulatory scheme, for all its detail, is quite simple. Congress intended to regulate pollutants *going into* "navigable waters," by requiring permits to control pollutants *coming out of* "point sources." *See* 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act). The Court of Appeals never considered this distinction, and should not have afforded *Chevron* deference to the Corps's interpretation that "point sources" are CWA "navigable waters."

A. Ditches and Drains.

Rapanos concerns three separate properties in different Michigan counties: (1) the 175-acre Salzburg site which lies next to the Labozinski Drain, described by the lower courts as a manmade ditch. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1014 (E.D. Mich. 2002) (a "ditch which empties into Hoppler Creek"), *aff'd*, 339 F.3d 447, 449 (6th Cir. 2003) (a "one hundred year-old manmade drain"); (2) the 600-acre Hines Road site, which is embroidered with drainage ditches and is itself drained by a ditch called the Rose Drain. (Cert. App. B19); and (3) the 49-acre Pine River site, with onsite wetlands that are adjacent to ditches. (Cert. App. B24-B25.)

The 19.61 acre *Carabell* site in Macomb County, Michigan, is separated from adjacent property by an unnamed ditch. Sidecasted spoils from the ditch's excavation created an upland berm, which blocks drainage of surface water from the site. The direction of water flow from the ditch is unclear, although the ditch connects to another ditch known as the Sutherland-Oemig Drain at the site's northeastern corner. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 705-06 (6th Cir. 2004). The Sutherland-Oemig drain is part of Macomb County's storm sewer system, which has received a pollutant discharge permit from the Michigan Department of Environmental Quality under Section 402 of the CWA. (App. 1b, 6b.)

B. The CWA is Clear: Ditches Are "Point Sources," not "Navigable Waters."

In both cases, the Corps has interpreted its regulations to deem the ditches in question "tributaries" so as to reach the wetlands adjacent to them. *See* 33 C.F.R. § 328.3(a)(5)

(tributaries); *id.* § (a)(7) (adjacent wetlands). The Corps's interpretation is unsupported by reference to any rule or guidance; its regulations do not define "tributary." For that matter, "tributary" and "adjacent wetlands" are nowhere defined in the CWA. Yet, the Court of Appeals deferred to the Corps's belief that a ditch is a "navigable water."

This was wrong. At 33 U.S.C. § 1362(14), Congress plainly stated that ditches are "point sources":

> The term "point source" means ***any*** discernible, confined and discrete conveyance, ***including but not limited to any*** pipe, ***ditch***, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged .... (Emphasis supplied.)

Exercises in construction "begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Obedience to text is especially due when Congress defines statutory terms. "[W]hen a statute includes an explicit definition [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). *See also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("statutory definitions of terms ... prevail over colloquial meanings"); *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words ...."). In Section 502(14), Congress could not have been clearer: a "point source" is *any* ditch, from which pollutants are or may be discharged.

CWA Section 502 defines two key terms: "navigable waters" at subsection (7), and "point source" at subsection

(14). 33 U.S.C. §§ 1362(7), (14). "The term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* at § 1362(7). By regulation, the Corps includes "tributaries" within the statutory phrase, "waters of the United States." 33 C.F.R. § 328.3(a)(5). "Ditch" is not included in either the CWA definition or in the Corps's regulation, but it is expressly identified in the Act's definition of "point source." Explicit definitions must prevail. *Western Union*, 323 U.S. at 502. Accordingly, the ditches at the *Rapanos* and *Carabell* sites are not "navigable waters." They are "point sources."

Additionally, specific statutory provisions govern over general provisions. *See, e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted). Although no specific kind of waterbody is listed in the "navigable waters" definition, that broad term may include bays, lakes, sounds, gulfs, rivers, streams and even non-navigable wetlands right next to truly navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In contrast, Congress "specifically dealt with [ditches] in another part of the same enactment." *See Fourco*, 353 U.S. at 228 (citations omitted). Under the rule that specific provisions supersede general ones, the precise inclusion of "ditch" in the "point source" definition trumps an interpretation that ditches are somehow penumbral to the "navigable waters" definition.

Moreover, the "most important" rule of statutory construction "is the clear statement rule." I Laurence Tribe,

American Constitutional Law, § 5-9 at 853 (3d ed. 2000). Where, as here, an agency interprets a statute in a manner that "invokes the outer limits of Congress' power" or overrides the "usual constitutional balance of federal-state powers," this Court "expect[s] a clear indication that Congress intended that result" pressed by the agency. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 151, 172-73 (2001). The CWA contains no clear statement that a ditch is a "navigable water"—but the Act is unequivocal that a ditch is a "point source." To avoid difficult federalism questions, and to effectuate congressional policy "to recognize, preserve, and protect the primary role of States" in addressing water pollution (33 U.S.C. § 1251(b)), the Court should reject the interpretation that an ordinary ditch is a "navigable water."

Congress "left [no] gap for the agency to fill" in defining a ditch as a "point source," not as a "navigable water." *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). It has spoken to the issue, "that is the end of the matter," and the Court must give effect to clearly expressed legislative intent under *Chevron* Step 1. *Id.* at 842. The Court of Appeals should therefore be reversed.

C. The "Discharge" Definition Further Clarifies that Ditches are not "Navigable Waters."

The "discharge" definition drives home the point that Congress did not intend for ditches and other "point source[s]" to be "navigable water[s]." The Act provides: "[D]ischarge of a pollutant" ... means ... any addition of any pollutant ***to*** navigable waters ***from*** any point source ...." 33 U.S.C. § 1362(12) (emphasis added). Under a plain reading of the statute, "point sources" are not themselves

statutory "navigable waters," but are features that convey pollutants and add them to "navigable waters."

Congress intended to control pollutant discharges through point source permit programs. CWA Section 402, the National Pollutant Discharge Elimination System ("NPDES"), requires point source operators to obtain permits for the addition of pollutants into navigable waters. 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) ("The NPDES permit program was designed to control 'point sources' of pollution"). Under Section 402, EPA regulates pollutants that exit point sources, not pollutants entering them. *See S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004) (explaining that point sources require permits when they convey pollutants to navigable waters). Similarly, Section 404 requires point source operators to obtain a Corps permit for discharges of a specific type of pollutant, namely, dredged or fill material. 33 U.S.C. § 1344. In short, operators must obtain Section 402 or 404 permits when pollutants leave ditches (or other point sources) and enter "navigable waters."

While *amicus* maintains that this case should be decided under *Chevron* Step 1 (*supra* at 6), the Corps's interpretation flips the CWA's regulatory scheme on its head and is unreasonable as well, also failing *Chevron* Step 2. "Discharge" is not the addition of pollutants from one "navigable water" into another "navigable water." *See Miccosukee,* 541 U.S. at 104-05 ("discharge" requires addition of pollutants from one "meaningfully distinct" waterbody to another, *through* a point source). If the Corps's interpretation is upheld, such a reading would require a federal permit for the Mississippi River where it discharges into the Gulf of Mexico. Moreover, the Corps's

current litigation argument is contrary to consistent regulatory statements it has made down the years that upland drainage ditches are *not* CWA "navigable waters."[2] "An agency interpretation of a relevant provision which conflicts with [its] earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987) (citations omitted). Deference is not due, as here, to agency "litigating positions that are wholly unsupported by regulations, rulings or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

D. Like Ditches, Municipal Storm Sewer Systems are "Point Sources" and not "Navigable Waters."

Another type of point source is a municipal separate storm sewer system, or "MS4." This is pertinent to *Carabell,* because the Sutherland-Oemig Drain (*supra* at 3) is part of Macomb County's MS4. Under CWA Section 402 and Michigan Act 451 (Mich. Comp. Laws § 324.101 (1994)), the County maintains an NPDES permit for its MS4, which expressly includes the Sutherland-Oemig Drain. (App. 1b, 6b.) By virtue of its inclusion in the

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[2] *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975) ("[d]rainage ditches have been excluded" from CWA jurisdiction); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) ("waters of the United States do not include the following man-made waters: (1) Non-navigable drainage and irrigation ditches excavated on dry land"); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) ("We generally do not consider [drainage and irrigation ditches excavated on dry land] to be waters of the United States."); 67 Fed. Reg. 2020, 2087 (Jan. 15, 2002) (nationwide permit for reshaping drainage ditches in jurisdictional wetlands "does not apply to reshaping drainage ditches constructed in uplands since these areas are generally not waters of the United States").

Macomb County MS4, dirt and other pollutants conveyed through the Sutherland-Oemig Drain into navigable waters have been authorized under Section 402 of the Act. (App. 3b.) (It is unclear whether any of the ditches in *Rapanos* are part of an MS4.)

Congress amended the CWA in 1987 and added Section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges.[3] By putting the MS4 program in Section 402, Congress expressed its intent that MS4s are "point sources." EPA thereby defined "MS4" to track the Act's "point source" definition. *Compare* 33 U.S.C. § 1362(14) (*supra* at 4), *with* 40 C.F.R. § 122.26(b)(8).[4] Courts also recognize that storm sewers are point sources subject to NPDES permitting requirements. *Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir.1977)

Permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management

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[3] *See* 33 U.S.C. §§ 1342(p)(3)(B), (4). The history of the MS4 permit program, and its phased approach for regulation of municipalities based on their population size, is traced in *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency,* 344 F.3d 832, 841-42 (9th Cir. 2003).

[4] EPA defines MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, *ditches,* man-made channels or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water ...." 40 C.F.R. § 122.26(b)(8) (emphasis supplied).

practices, control techniques and systems, design, and engineering methods." 33 U.S.C. § 1342(p)(3)(B)(iii).[5] Modern MS4s are waste treatment systems because they reduce pollutants by treating stormwater with such features as settling structures to collect sediment, and racks to capture trash. Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993); *Design and Construction of Urban Stormwater Management Systems* 454, 489-511 (Am. Soc'y of Civil Eng'rs 1992). Indeed, EPA identifies stormwater as a "waste."[6] The key point is this: EPA expressly excludes "waste treatment systems" from the definition of "waters of the United States," *see* 40 C.F.R. § 122.2, and a recent memo from EPA's General Counsel and Assistant Administrator for Water confirms that "waste treatment systems" like MS4s are "by definition" *not* CWA "navigable waters." (App. 3c, at n. 18.)[7] When a third party discharges into an MS4, which itself discharges directly into a "navigable water," EPA "always addressed such discharges as 'discharges *through* [MS4s] as opposed

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[5] "Best management practices" include "treatment requirements." 40 C.F.R. § 122.26(d)(iv)(D).

[6] 40 C.F.R. § 122.26(b)(8)(i) (MS4 is a conveyance system owned and operated by a municipality with jurisdiction over the "disposal of sewage, industrial wastes, storm water, *or other wastes*") (emphasis supplied).

[7] Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, at 18, n. 18 (Aug. 5, 2005) (excerpts at App. C).

to 'discharges to waters of the United States ....'" 55 Fed. Reg. 47,990, 47, 997 (Nov. 16, 1990) (emphasis supplied).

"[A] statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). *See also Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (court should "find that interpretation which can most fairly be said to be imbedded in the statute [and is] ... most harmonious with its scheme and with the general purposes that Congress manifested"). Section 402(p)'s structure and EPA's regulations make clear that MS4s are "point sources," not "navigable waters." As such, the Court of Appeals should be reversed for ruling in *Carabell* that the Sutherland-Oemig Drain is a "navigable water," because that ditch is part of the Macomb County MS4.

E. Classifying Ditches and MS4s as "Navigable Waters" Yields Unreasonable Results.

If the Corps's interpretation holds, all of the CWA's requirements and programs for "navigable waters" would be triggered for ditches and MS4s. But "statutes should be interpreted to avoid ... unreasonable results whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). For example, Section 303 requires States to adopt and submit to EPA water quality standards ("WQSs"), 33 U.S.C. § 1313, which "consist of a designated use or uses for the waters of the United States ...." 40 C.F.R. § 131.3(i).[8] There are an estimated 3.9 million miles of roads

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[8] An example of a designated use: "All the Great Lakes, and their connecting waters ... are designated for ... coldwater fisheries." Mich. Admin. Code R. 323.1100(5) (1999).

in the Nation,[9] and regulations require that federally funded primary roads must be "designed ... and maintained to have adequate drainage, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d). If all of these roadside ditches are "navigable water," then the Act would require States to establish WQSs for all of them. Congress could not have intended such an absurd result. Similarly, if MS4s are "navigable waters," then Section 303 requires States to develop WQSs and "designated uses" for the water in municipal sewer systems. The main purpose of an MS4 is to transport stormwater away from upland areas. However, using a "navigable water" in such a manner would plainly violate EPA's regulation that "in no case shall a State adopt waste transport ... as a designated use for any water of the United States." 40 C.F.R. § 131.10(a).

In conclusion, the Corps's interpretation that drainage ditches and parts of an MS4 are "navigable waters" should not receive deference because it (1) contradicts the CWA's plain language, and (2) is unreasonable in any event. The Court of Appeals should be reversed because it erroneously held that "point sources" at the *Rapanos* and *Carabell* sites are CWA "navigable waters."

II. WETLANDS ADJACENT TO FEATURES THAT ARE NOT "OPEN WATERS" ARE NOT WITHIN CWA JURISDICTION AS A MATTER OF LAW.

Corps regulations provide that wetlands "adjacent" to certain listed waters (like "interstate waters" and

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[9] U.S. Department of Transportation, Federal Highway Administration, Highway Statistics 2001 § V, Roadway Extent, Characteristics, and Performance Tbl. HM-10, at <http://www.fhwa.dot.gov/ohim/hs01/hm10.htm> (last visited Nov. 10, 2005).

"tributaries") are jurisdictional under the CWA. 33 C.F.R. § 328.3(a)(7). This Court has considered the (a)(7) regulation in the past, ruling that wetlands which actually abut "open waters" are jurisdictional. The Court of Appeals should be reversed because it extended adjacency jurisdiction to wetlands that are next to drainage ditches, which are "point sources," and are not "open waters."

A. *Riverside Bayview* and *SWANCC*

This Court considered the adjacency regulation in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). It allowed the CWA to cover non-navigable wetlands that "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 135. The Court stated it was expressing no opinion on the status of "wetlands that are not adjacent to bodies of *open water*." *Id.* at 131, n. 8 (emphasis supplied). Then in *SWANCC*, the Court stressed that the *Riverside Bayview* wetlands "actually abutted on a navigable waterway" (531 U.S. at 167), and ruled against the Corps because "the text of the statute will not allow" coverage of ponds that "are *not* adjacent to open water." *Id.* at 168 (original emphasis). The dissent read the majority opinion as "excising" from the CWA waters "that are not contiguous or adjacent to navigable waters." *Id.* at 190, n. 14 (Stevens, J., dissenting).

B. This Court Treats "Open Waters" as Navigable-in-Fact Water.

Riverside Bayview and *SWANCC* used the term "open water" and "navigable waterway" interchangeably. Indeed, Black Creek is traditionally navigable-in-fact and has

supported heavy boat traffic.[10] In this regard, these opinions are part of the Court's long tradition of using the phrase "open water" as synonymous with navigable-in-fact water. For example, in *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947), the Court explained that pilots take ships from "open waters" to local waters. In *United States v. Oregon*, 295 U.S. 1, 22 (1935), "open water" described the area where boats could be used. The Court has also analyzed whether the term "high seas" in a criminal statute applied "to the open, uninclosed waters of the Great Lakes, between which the Detroit River is a connecting stream." *United States v. Rogers*, 150 U.S. 249, 253 (1893). The Court observed, "the fact remains that there are other seas than the ocean, whose open waters constitute a free highway for navigation to the nations and people residing on their borders ...." *Id* at 256. *See also The Nevada v. Quick*, 106 U.S. 154, 158-59 (1883) (a steamship "may freely exercise its powerful propeller and sport its leviathan proportions on the ocean or in deep and open waters"). In short, the phrase "open water" abounds in maritime and admiralty cases, and it has consistently referred to navigable-in-fact water.

C. Likewise, Federal Agencies Understand "Open Water" to Mean Navigable-In-Fact Water.

Numerous federal regulations use the phrase "open water" similarly. For example, Federal Aviation Administration regulations require minimum safe altitudes for aircraft of 500 feet above the surface, "except over open

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[10] *See* The Macomb Daily, *Boat Jam*, (June 13, 2003), available at http://204.176.34.196/macombdaily/article.asp?ID=8560595 (reporting that several rivers including Black Creek experienced boat jams in warm weather so that public ramps had to be temporarily closed).

water or sparsely populated areas." 14 C.F.R. § 91.119. Similar restrictions apply for persons test flying aircraft "except over open water." 14 C.F.R. § 91.305. National Oceanic and Atmospheric Administration regulations, in 15 C.F.R. Pt. 921, App. II, define volcanic estuaries as "coastal bodies of open water ...." At 40 C.F.R. § 125.83, EPA defines a "[l]ake or reservoir [to] mean[ ] any inland body of open water with some minimum surface area free of rooted vegetation ...." The Department of Interior, in 43 C.F.R. Pt. 11, App. II, defines "landward open water" as "a body of water that does not contain vegetation, (e.g., wetland, seagrass, or kelp)." And regulations of the Department of Transportation state that facilities at which flammable solids are loaded or unloaded "must be located so that each vessel ... has an unrestricted passage to open water." 49 C.F.R. § 176.415(c)(4).

In opposing the petitions for writs of *certiorari*, the Corps contended that the term "open water" is "a shorthand for 'rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" Resp't Cert. Br. in Opp'n at 11, *Carabell v. United States Army Corps of Eng'rs*, No. 04-1384 (U.S. 2005); Resp't Cert. Br. in Opp'n at 14, *Rapanos v. United States*, No. 04-1034 (U.S. 2005). That position is emphatically belied by the overwhelming judicial and regulatory precedent, spanning decades, equating "open water" with navigable-in-fact water. No one coming upon the MS4 or ditches at the *Carabell* or *Rapanos* sites would think they had reached "open water." This Court's decisions simply do not sweep into CWA jurisdiction wetlands adjacent to ditches, drains, and MS4s.

Read in tandem, *Riverside Bayview* and *SWANCC* provide legal guideposts at opposite ends of the CWA jurisdictional spectrum. As a matter of law, the Corps (1)

has power over "open water" (*i.e.*, navigable-in-fact) and immediately abutting wetlands, but (2) *lacks power* over waters that are isolated from navigable-in-fact waters. The ditches at issue in these cases are not "open waters," so the wetlands next to them are not within Corps authority as a matter of law, and the Sixth Circuit should be reversed.

III. TO SATISFY THE "SIGNIFICANT NEXUS" PRINCIPLE, THE GOVERNMENT SHOULD PRODUCE PROOF OF DOWNSTREAM EFFECT ON NAVIGABLE-IN-FACT WATERS.

In Part I, *amicus* maintained that any non-navigable feature which is itself a "point source," such as a ditch or an MS4, is not a CWA "navigable water." In Part II, *amicus* explained that the CWA does not, as a matter of law, reach wetlands adjacent to ditches, MS4s, and other features that are not "open water." We submit that the Court of Appeals should be reversed on these points alone.

However, questions of CWA jurisdiction are by no means limited to "point sources" or wetlands immediately adjacent to "open water." For example, whether the CWA encompasses a non-navigable linear feature (like a remote tributary, creek, or stream) is a lingering question. Part III thus addresses the mode of analysis that should be employed to determine whether CWA jurisdiction encompasses non-navigable linear features in any given case. As discussed below, *SWANCC* has provided the legal standard to help answer this question: there must be a "significant nexus" to navigable-in-fact waters. This Part will flesh-out what that standard means, and what facts the Corps must adduce to satisfy that standard when it brings

an enforcement action against property owners regarding remote tributaries and the like.[11]

"Navigability ... is not susceptible of definition or determination by a precise formula which fits every type of stream or body of water under all circumstances and at all times." 78 Am. Jur. 2d Waters § 124 (May 2005). "[E]ach determination as to navigability must stand on its own facts." *United States v. Appalachian Power Co.*, 311 U.S. 377, 403 (1940) (quoting *United States v. Utah*, 283 U.S. 64, 87 (1931)). The same should hold true when determining the scope of CWA "navigable waters." Whether a particular tributary has a "significant nexus" to navigable-in-fact waters must be determined by considering all surrounding circumstances. Indeed, evidence of persistent, downstream *effects* on navigable-in-fact waters should be crucial to any "significant nexus" inquiry.

A. Historical Context

In England, virtually all navigable waterways are susceptible to the ebb and flow of the tide, so at common law "'tidewater' and 'navigability' were synonymous." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478 (1988). Given the continental expanse of the United States, a "different test" was needed on these shores because "[s]ome of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water ...." *The Daniel Ball*, 77 U.S. 557, 563 (1870). Thus, the classic test is that American waters are "navigable in law when they are navigable in fact. And they are navigable in fact

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[11] The burden of proof is on the government when it asserts navigability. *See, e.g., Mundy v. United States*, 22 Cl.Ct. 33, 34 (1990); *United States v. 531.10 Acres in Anderson County, S.C.*, 243 F. Supp. 981, 986 (D.S.C. 1965).

when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted ...." *Id.* at 563.

As the Nation's population grew, so burgeoned our need for water. In the early 20th century, federal agencies (primarily the Corps and the Bureau of Reclamation in the Interior Department) commenced massive public works projects to harness rivers and streams for beneficial uses like irrigation, power, and water supply. *See generally* Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* (rev. ed. 1993). *The Daniel Ball* test, as it is limited to in-fact navigable waters, could not accommodate the Nation's unslakeable thirst. A more flexible formulation—not so strictly bound to the control of navigation—became necessary. Thus, in time, the Court recognized that federal power needed to encompass *non-navigable waters* that may be made navigable-in-fact with "reasonable improvements." *Appalachian Power,* 311 U.S. at 407-09 (1940). *See also Econ. Light & Power Co. v. United States,* 256 U.S. 113, 118 (1921) (non-navigable points on Des Plaines River "above the head of steamboat navigation" regarded as navigable-in-law).

Accordingly, what is "navigable" has changed over time, and congressional power may fairly encompass non-navigable features. But this is the crucial point: this Court has endorsed federal authority over non-navigable features only as needed to service the constitutional power to regulate navigation, which derives from the commerce authority.

> The plenary federal power over commerce must be able to develop properly with the needs of that commerce which is the reason for its existence. *It cannot properly be said that the federal power over*

> *navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce."*

Appalachian Power, 311 U.S. at 409 (emphasis supplied). The Court has thus upheld federal authority over non-navigable features, but only as necessary to effectuate the federal navigation power.

Indeed, federal authority over navigable-in-fact waters is "plenary," "as broad as the needs of commerce," and may be wielded for purposes other than navigation (like irrigation and hydropower). *Appalachian Power*, 311 U.S. at 426. Federal authority over non-navigable features is not nearly so broad, and has been sustained only upon findings and evidence that activities conducted in or upon such features will actually and demonstrably impact downstream navigable-in-fact waters. For example, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), Congress had the power to prevent a state's appropriation of water, "even at a place above the limits of navigability," where such an appropriation "diminish[es] the volume of waters [flowing into] a navigable stream, to such an extent as to *destroy its navigability*." *Id.* at 709 (emphasis supplied). The Court examined international treaties, "affidavits and other evidence" to determine that the state's uses would "substantially interefere[] with the navigable capacity" of the Rio Grande and could be enjoined by federal statute. *Id.* at 708-09.

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941), is similar. The Court upheld congressional authority to control water flows over non-navigable stretches of the Mississippi River to prevent

flooding in the River's navigable-in-fact segments. *Id.* at 516-24. Extensive documentation through a legislative and engineering record allowed the Court to find that the activities in the upstream, non-navigable portion of the River had a "tangible" effect on the downstream, navigable portion. *Id.* at 524.

Accordingly, the Court has long taken a measured, cautious approach when determining the reach of federal power over non-navigable features. While flexibility is necessary as the needs for commerce evolve, traditional notions of navigability must always set the bounds on federal authority. The above cases are thus premised on regulating activities in non-navigable features only where they cause "substantial interference" with, and "tangible impact" on, downstream navigable-in-fact waters.

B. "Significant Nexus"

The rulings in *Riverside Bayview* and *SWANCC* fit comfortably within this historical context. In *Riverside Bayview,* the Court upheld federal CWA jurisdiction over non-navigable wetlands that "actually abut[ted] on a navigable waterway," Black Creek (474 U.S. at 135); the wetlands and the Creek were "inseparably bound up" with each other. *Id.* at 134. Given their physical inseparability, any discharge of pollutants into the non-navigable wetlands would have a direct impact on the immediately adjacent, navigable-in-fact Creek. *SWANCC* stressed that the *Riverside Bayview* holding "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. Accordingly, finding no inseparable relationship between non-navigable ponds isolated from

navigable-in-fact waters, the Corps's claim of jurisdiction over the isolated ponds "exceed[ed] the authority ... under Section 404(a) of the CWA." *Id.* at 174.

In reinforcing the need for an "inseparable" relationship between non-navigable features and navigable waters, the *SWANCC* Court stated: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" 531 U.S. at 167 (emphasis supplied). The "significant nexus" standard artfully captures the need to both maintain and keep flexible the traditional notions of navigability. To achieve the vital goal of cleaning-up our Nation's waters, Congress afforded "limited import" to the term "navigable" as used in the CWA, so as "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview,* 474 U.S. at 133. Meanwhile, that "classical understanding" provides the very constitutional basis for congressional action:

> The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact, or which could reasonably be so made.

SWANCC, 531 U.S. at 172 (citing *Appalachian Power,* 311 U.S. at 407-08). "Significant nexus" grounds the Act's scope to navigable-in-fact waters, while affording "limited import" to traditional jurisdiction by allowing federal authority to sometimes reach non-navigable features.

C. Hydrologic Connection Alone does not Satisfy the "Significant Nexus" Standard.

The cases at bench upset this careful balance. The Court of Appeals, by endorsing the Corps's hydrologic connection theory of jurisdiction, tipped all of the weight toward the "limited import" side at the expense of the "traditional jurisdiction" side. *Carabell* found CWA jurisdiction over wetlands adjacent to "a nonnavigable ditch abutting their property, a ditch that flows *one way or another* into other tributaries of navigable waters ...." 391 F.3d at 710 (emphasis supplied). In *Rapanos*, the Court of Appeals deemed "adjacent *waters*" (not simply *wetlands*) jurisdictional by concluding that a "significant nexus ... can be satisfied by the presence of a hydrological connection." 376 F.3d at 639. *See also United States v. Rapanos,* 339 F.3d 447 (6th Cir. 2003), *cert. denied,* 541 U.S. 972 (2004) (criminal phase; "ample nexus" is sufficient). Both cases rely heavily on the Fourth Circuit's decision in *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *cert. denied,* 541 U.S. 972 (2004), which endorsed CWA jurisdiction where there is simply "*a* nexus" to navigable-in-fact waters, and construed *SWANCC* as "*suggesting* that covered nonnavigable waters are those with *'some connection'* to navigable ones." *Id.* at 709 (emphasis supplied). *Deaton* is universally cited for the proposition that "jurisdiction extends over any branch of a tributary system that *eventually flows* into a navigable body of water." *Id.* at 711 (emphasis supplied).

The purposeful choice of words selected by these Courts of Appeals disserves this Court's "significant nexus" requirement. *Riverside Bayview* and *SWANCC* never "suggested" that federal CWA authority depended on an "eventual flow" of water "one way or another," or that

"a" nexus or "some" connection is all that is needed to trigger the Corps's power. Rather, this Court announced that the standard is a "significant nexus."

Amicus respectfully urges the Court to reject the hydrologic connection theory as a stand-in or substitute for "significant nexus," because the Corps's approach supports CWA jurisdiction—as a matter of law—based on nothing more than the presence of a route along which water molecules may possibly migrate. For example, *Carabell* upheld a grant of summary judgment in the Corps's favor (391 F.3d at 707), based on a record that simply traced a course between wetlands next to "an unnamed ditch," which connected to a drain, then to a creek, and eventually to the Great Lakes. *Id.* at 708. *Rapanos* upheld a criminal conviction solely based on testimony of a state official who "followed the flow of water" and discerned "a surface connection between the Salzburg site and the Saginaw Bay." *Rapanos,* 376 F.3d at 642. Likewise, *Deaton* granted motions for summary judgment, and to reconsider CWA jurisdiction, in favor of the Corps. *Deaton,* 332 F.3d at 703. The Fourth Circuit found CWA jurisdiction merely due to a "winding thirty-two mile path" between a roadside ditch and the Chesapeake Bay (*id.* at 702), through which drops of water "eventually flow" (*id.* at 711) and "ha[ve] the potential" to carry pollutants downstream. *Id.* at 707. The most extreme example of the hydrologic connection theory that *amicus* has located is *United States v. Buday,* 138 F. Supp. 2d 1282 (D. Mont. 2001). It stretched the CWA to reach a non-navigable creek, solely due to a 190-mile linear connection to the closest navigable-in-fact water. *Id.* at 1283.

The federal government has won these cases by playing a game of six degrees of separation (one way or another).

To justify CWA jurisdiction, the Corps deems unnecessary facts like the amount, direction, duration, and frequency of water flow. But such facts regarding the *extent* of hydrologic *exchange* (not simply distance) between non-navigable and navigable resources should be critical to the "significant nexus" calculus. Put another way, a hydrologic connection is a prerequisite to prove a *nexus*, but that alone does not prove the nexus is *significant*.[12]

D. *Effect* on Navigable-in-Fact Waters Must be Imported into a "Significant Nexus" Analysis.

The hydrologic connection theory is a conspicuous detour from the path charted by this Court, dating back to *The Daniel Ball* and up through *SWANCC*, because it is not moored to any showing that upstream activity in a non-navigable area causes an actual, downstream impact on navigable-in-fact water. The Fifth Circuit's decision in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is instructive. The *Rice* court rejected claims of CWA jurisdiction over intermittent streams, *even though some connection to navigable waters existed:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself .... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. *In short, there is*

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[12] The common meaning of "significant" is "[h]aving or likely to have a major effect; important." The American Heritage® Dictionary of the English Language (4th ed. 2000).

> *nothing in the record that could convince a reasonable trier of fact* that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water....

Id. at 270-71 (emphasis supplied).

A district court decision regarding the New Jersey Meadowlands is also on point. In *FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003), the court couched the question as "whether there is a substantial nexus—beyond a mere hydrologic connection—between the [property] and the navigable waters of the Hackensack River." *Id.* at 516-17. The *FD&P* court decided it could not grant summary judgment in favor of the Corps because, following *SWANCC*, "'hydrological connection' is ... [not] the relevant standard ...." *Id.* at 517. Summary judgment was also not granted for the property owner, because "the evidence submitted by the parties does not permit this court to conclude that no genuine issue of material fact exists *as to the effect* of the filling of the wetlands on the Hackensack River." *Id.* (emphasis supplied).

Thus, the government should not win a motion for summary judgment (or some other dispositive motion on the law), where material facts are disputed or lacking regarding the impact on downstream navigable-in-fact waters. Whether a non-navigable feature is subject to CWA jurisdiction under the "significant nexus" standard must be based on solid proof showing an on-going *impact or effect* on downstream navigable waters. Considering impact is fully consistent with seminal cases like *Appalachian Power* and *Rio Grande Dam*, which have

allowed the extension of federal authority over non-navigable features based on evidence of a persistent, deleterious downstream effect. *See supra* at 18-20.

E. Requiring Proof of Effect is Consonant with the CWA's Objective to Prevent Actual Discharges of Pollutants.

Requiring the Corps to show downstream impact on navigable-in-fact waters makes all the more sense in the modern context, given the CWA's overriding regulatory objective to prohibit the unpermitted discharge of pollutants. *Supra* at 2. The federal government has no CWA authority to require a permit for activities that may only result in a *potential* discharge of pollutants.

> In the absence of an *actual addition* of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, ... and no statutory obligation of point sources to seek or obtain [a CWA] permit in the first instance.

Waterkeeper Alliance, Inc., v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 505 (2d Cir. 2005) (emphasis supplied).

Enforcement actions brought by the Corps are typically based on alleged discharges of common dirt—the pollutant at issue—without a permit. Thus, at the very least, the government should be required to produce evidence showing that the upstream activities it seeks to regulate cause dirt to migrate off-site and enter the hydrologic flow. How can there be an actual discharge of sediment, if sediment never leaves a construction site and is not transported downstream? But there is no such evidentiary showing in *Carabell, Rapanos,* or other hydrologic

connection cases, because they are not premised on an actual discharge of pollutants, but rather on the assumption that a pollutant "*has the potential* to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707 (emphasis supplied). In short, if the Corps's "hydrologic connection" theory is the standard, all it needs to prove is that a ditch connects to a creek, which connects to a stream, which connects to a river, which is all part of a tributary system, that contributes downstream flow.

Yet Congress did not prohibit the *potential* addition of *water* to "navigable water," but the *actual* addition of *pollutants* to "navigable water." Polluting activities in non-navigable features that result in an actual discharge must be regulated. However, that outcome can be obtained without deeming a common drainage ditch and every inch of its downstream path a CWA "navigable water."

To this end, several reported decisions, where there is clear evidence of an actual discharge of pollutants, needlessly go too far in alchemizing certain non-navigable features into statutory "navigable waters." In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 528 (9th Cir. 2001), toxic herbicides were discharged through irrigation canals into Bear Creek, where "[o]ver 92,000 juvenile steelhead were killed." In light of that proof of environmental harm from an actual discharge of pollutants through point sources, it was entirely unnecessary for the court to rule that the canals (that is, "point sources") were "tributaries" encompassed by the CWA. *Id.* at 533. Likewise, in *United States v. Eidson*, 108 F.3d 1336, 1340, 1342 (11th Cir. 1997), the appellant was caught pumping a "sludge substance" from a truck, through a hose, which flowed into a storm sewer. (The truck, the hose, and the

sewer system were all point sources.) The flow then left the sewer and entered a *tidal* drainage canal that directly emptied into Tampa Bay. *Id.* at 1342-43. Under those facts, it was not necessary for the court to declare the sewer system a CWA jurisdictional "tributary of Tampa Bay" to affirm the criminal convictions. *Id.*

These cases warrant comparison to *In re Needham*, 354 F.3d 340 (5th Cir. 2003), where federal regulatory jurisdiction was *upheld* based on the parties' factual stipulation that "residue from the spill was found 10-12 miles from the oil well, *i.e.*, in Bayou Folse," an undisputed traditionally navigable water. *Id.* at 346. In affirming federal regulatory authority, the Fifth Circuit nonetheless declared the hydrologic connection theory as "unsustainable under *SWANCC*," and *refused* to extend federal power "over puddles, sewers, roadside ditches, and the like." *Id.* at 345. *Needham* perfectly shows that a polluting activity can be regulated under the CWA without federalizing the place—as long as there is an actual, discernible discharge of pollutants through a point source and into downstream, navigable-in-fact waters.

F. The "Significant Nexus" Standard is Analogous to a Proximate Cause Requirement.

Whether a non-navigable feature has a "significant nexus" to a navigable water is another "difficult question[] of proximity and degree" for this Court. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 708 (1995). Federal environmental regulations are commonly premised on a threshold showing of "significant" effects. In *Sweet Home*, for example, the Court upheld a U.S. Fish and Wildlife Service regulation under the Endangered Species Act, which defined "harm"

to species as including "*significant* habitat modification." 50 C.F.R. § 17.3. The majority observed that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which *actually* kills or injures wildlife." *Id.* at 700 (emphasis supplied). Justice O'Connor's concurrence upheld the regulation because it "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals." *Id.* at 708-09. She further noted that the activity in question must be the proximate and foreseeable cause of the species' actual injury. *Id.* at 709. Proximate cause "is about the legal *significance* of causation, rather than the existence of causation." Dan B. Dobbs, *The Law of Torts* § 167, 409 (2000) (original emphasis). "These questions must be addressed in the usual course ... through case-by-case resolution and adjudication ..." *Sweet Home*, 515 U.S. at 713.

Similarly, the National Environmental Policy Act (NEPA) requires the preparation of an environmental impact statement for major federal actions "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332(2)(C). Regulations state that "'[s]ignificantly' as used in NEPA requires consideration of both context and intensity," with "intensity" bearing on "the severity of the impact" and including evaluation of "[t]he degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b). Thus, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause[,]" an approach analogous "to the 'familiar doctrine of proximate cause from tort law.'" *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

Perhaps *SWANCC*'s "significant nexus" standard is best designed to ensure that upstream activity in a non-navigable feature proximately causes concrete, actual harm to navigable-in-fact waters further downstream. *See Rice*, 250 F.3d at 272 (requiring a "close, direct, and proximate link between ... [the] discharges of oil and any resulting actual, identifiable oil contamination"). The "hydrologic connection" theory, however, with its premise on potential impacts and eventual flows, is nothing more than a variant of "but for" causation. Such a loose causal relationship should not be the standard by which the federal government can assert its awesome regulatory power under the CWA. The Corps should be required to prove more than a "but for" connection when it brings CWA enforcement actions against private land owners.

CONCLUSION

The judgments of the Court of Appeals should be reversed.

DATED: December 2, 2005

Respectfully submitted,

Duane J. Desiderio
(Counsel of Record)
Thomas J. Ward
Felicia K. Watson
THE NATIONAL ASSOCIATION
OF HOME BUILDERS

Attorneys for *Amicus Curiae*

TABLE OF APPENDICES*

A. List of Cases in Which NAHB has Appeared as an *Amicus Curiae* Before This Court 1a

B. Excerpts from National Pollutant Discharge Elimination System (NPDES) Permit, Issued by State of Michigan Department of Environmental Quality, to Macomb County Public Works Office, Regarding Macomb County MS4 (Dec. 17, 2003) ... 1b

C. Excerpts from Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005) 1c

*Under Rule 32.3, *Amicus* will lodge complete copies of the documents in Appendices B and C at the Court's request.

Cases in which the National Association of Home Builders has appeared before the U.S. Supreme Court as an amicus curiae:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); and *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

December 17, 2003

Ms. Lynn Yustick
Macomb County Public Works Office
115 South Groesbeck Highway
Mount Clemens, Michigan 48043

Dear Ms. Yustick:

SUBJECT: National Pollutant Discharge Elimination System (NPDES)
Certificate of Coverage No. MIG610052
Designated Name: Macomb Co MS4

Your certificate of coverage under NPDES General Permit No. MIG619000 has been processed in accordance with appropriate State and Federal regulations.

Please carefully review the requirements contained in Certificate of Coverage No. MIG610052, which is enclosed, and General Permit No. MIG619000. If you do not have a copy of the General Permit, one can be obtained via the Internet at: (http://www.michigan.gov/deq - on the left side of the screen click on Water, Surface Water, and NPDES Permits; then click on "General NPDES Permits" which is under the Permits banner), or you may call the following number to request a paper copy: (517) 373-8088. These requirements are subject to the criminal and civil enforcement provisions of both State and Federal law.

Permit compliance and violations are audited by the Department of Environmental Quality (DEQ) and the United States Environmental Protection Agency.

You must comply with the requirements and other responsibilities in accordance with General Permit No. MIG619000 and Certificate of Coverage No. MIG610052. A guidance document is enclosed to help you develop your Public Participation Process, which shall be submitted by the date specified in your certificate of coverage. Any reports, notifications, or questions regarding the NPDES program, the enclosed certificate of coverage, or the general permit-should be directed to the DEQ office indicated on your certificate of coverage.

Sincerely,

Christe Alwin

Christe Alwin
Lakes Erie and Huron Permits Unit
Surface Water Permits Section
Water Division
517-241-7414

CA/sea

Enclosures: Certificate of Coverage No. MIG610052
Public Participation Process Guidance Document

cc: Mr. Phil Argiroff, Southeast Michigan District Office, Water Division, DEQ (with COC)
PCS Unit, Water Division (with COC)
File

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

DEQ WATER DIVISION

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

Authorized by Michigan Act 451, Public Acts of 1994, as amended, Part 31

CERTIFICATE OF COVERAGE

Under General Permit No. MIG619000
MS4 Watershed General Permit

CERTIFICATE OF COVERAGE NO.: MIG610052

DESIGNATED NAME: Macomb Co MS4

PERMITTEE MAILING ADDRESS: Macomb County 115 South Groesbeck Highway Mount Clemens, Michigan 48043

This certificate of coverage authorizes Macomb County to discharge storm water through a separate storm water drainage system to waters of the state, including but not limited to the Clinton River, Lake St. Clair, Stony Creek, and the drains listed in Table I (attached). This authorization also includes nested jurisdictions for which the permittee has accepted responsibility. The applicable watersheds for this certificate of coverage and general permit are the Anchor Bay, Lake St. Clair Direct Drainage, Paint/Stony Creek, Red Run, Clinton River East and North Branch Clinton River.

The permittee shall submit an Illicit Discharge Elimination Plan and Public Education Plan, or updates to existing plans to comply with current permit requirements on or before November 1, 2004. The permittee shall begin implementation of its Illicit Discharge Elimination Plan and its Public Education Plan upon receiving approval from the Department or beginning 90 days after submittal, whichever comes first.

The general permit allows the permittee to implement one Storm Water Pollution Prevention Initiative for their jurisdiction. After the permittee develops and submits a Storm Water Pollution Prevention Initiative, all other Initiative submissions shall be developed as revisions to the existing Initiative. This Initiative shall be consistent with all of the permittee's authorizations as described below.

* * *

For the Lake St. Clair Direct Drainage watershed, the permittee, in conjunction with other permittees in the watershed, shall submit a joint Public Participation Process (Part I.B.1. of the permit) by May 1, 2004 and a joint Watershed Management Plan (Part 1.B.1. of the permit) by November 1, 2006. Based on development of the additional watershed plan, the permittee shall submit a revised Storm Water Pollution Prevention Initiative (or written determination not to revise the Initiative) (Part I.B.2.b. of the permit) by May 1, 2007. The permittee shall also submit a joint revised Watershed Management Plan (or written determination not to revise the Plan) (Part I.B.1. of the permit) by November 1, 2008 and any additional revisions to the Storm Water Pollution Prevention Initiative (or written determination not to revise the Initiative) (Part I.B.2.b. of the permit) by May 1, 2009.

* * *

The permittee shall submit an annual progress report by November 1st of each year beginning on or before November 1, 2004.

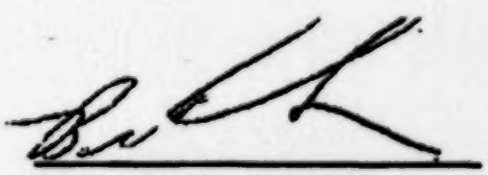
References in the general permit to the Department shall be defined as the Southeast Michigan District Supervisor of

the Water Division. The Southeast Michigan District Office is located at 38980 Seven Mile Road, Livonia, Michigan 48152-1006, telephone: 734-953-8905, fax: 734-953-1467.

* * *

This certificate of coverage is based on a complete application received by the Department of Environmental Quality on May 29, 2003. The permittee is subject to all conditions specified in General Permit No. MIG619000 issued December 5, 2002, expiring April 1, 2008. This certificate of coverage may be modified, terminated, reissued, or revoked as allowed for in General Permit No. MIG619000. On the effective date of this certificate of coverage, this certificate of coverage shall supersede Certificate of Coverage No. MIG610052, issued August 6, 2001, which is hereby revoked on the effective date of this certificate of coverage.

This certificate of coverage takes effect on the date of issuance.



December 16, 2003
Date Issued

Bryce Feighner, Chief
Lakes Erie and Huron Permits Unit
Surface Water Permits Section
Water Division

EQP 4677 (9/03)

Table 1. List of Drains under the jurisdiction of the MCPWO

'16 and One-Half Mile Drain'
'17 Mile Road Drain & Branches'
'18 Mile Drain'
'Ahrens Drain'
'Alexander Relief Drain and Branches'
'Alwardt Drain'
'Andersen Drain'
'Anderson East Branch Drain'
'Apel Drain'
'Armada and Ray Drain'
'Arndt Drain'
'Asbery Park Drain'

* * *

'Savan Drain'
'Savan Extension Drain'
'Schiebel Drain'
'Schocke Retention'

* * *

'Sutherland-Oemig Drain'

* * *

'Yates Branch Drain'
'Yates Drain'
'Zander Drain'

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

AUG - 5 2005

SUBJECT: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers

FROM: Ann R. Klee
General Counsel

Benjamin H. Grumbles
Assistant Administrator for Water

TO: Regional Administrators

This Agency interpretation addresses the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act (CWA) is applicable to water control facilities that merely convey or connect navigable waters. For purposes of this Agency interpretation, the term "water transfer" refers to any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use. This interpretation focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.[1]

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1 Section VI, below, discusses activities that are beyond the scope of, and not affected by, this Agency interpretation.

I. Overview

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of navigable waters, such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also serve to move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently addressed this issue in South Fla. Water Mgmt. Dist., v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved.[2]

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2 In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by the parties because the arguments had not been raised in the lower court proceedings. The Court noted that EPA had not spoken to these legal issues in an administrative document. 541 U.S. at 107.

* * *

* * *

VI. Scope of this Agency Interpretation

This Agency interpretation addresses only water transfers - that is, activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal or commercial use.[18] It does not address any other activities, or any jurisdictional terms under the statute other than "addition."[19]

For example, this interpretation does not affect EPA's longstanding position that, if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 C.F.R. § 122.2 (definition of process wastewater); 40 C.F.R. §§ 125.80-125.89 (regulation of cooling towers); 40 C.F.R. § 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Part 132,

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18 We emphasize, for purposes of clarity, that a water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody (although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred). Moreover, a discharge from a waste treatment system, for example, which by definition is not a water of the United States, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 C.F.R. § 122.2.

19 Thus, this interpretation does not address the meaning of the terms, "point source," "pollutant" or "navigable waters."

Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Conversely, waters that are diverted and used for irrigation and then reintroduced to the navigable waters are exempt from permitting requirements under the exemption for return flows from irrigated agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

* * *

VII. Conclusion

For the reasons explained above, based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES program. While resort to a case-specific evaluation of waters is not necessary or appropriate in light of Congressional intent, if such an evaluation were determined to be needed, a permit would not be required for waters that are not "meaningfully distinct" and that term should be construed in light of the water quality goals of the statute and Congressional intent to rely on non-NPDES authorities for overseeing water management activities. Finally, the Agency intends to initiate a rulemaking process to address water transfers.

DEC 2 - 2005

Nos. 04-1034 & 04-1384

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondents.

JUNE CARABELL, *et al.*,
Petitioners,

v.

ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONERS

FRANCIS EDWIN FROELICH *
CHARLES T. CARROLL, JR.
CARROLL & FROELICH, PLLC
919 18th Street, NW
Suite 901
Washington, DC 20006
(202) 587-4850

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The National Association of Waterfront Employers (NAWE) is a not for profit, trade association organized under section 501(c)(6) of the tax code.[1] NAWE represents the United

[1] Pursuant to S. Ct. Rule 37.6, counsel for *amicus curiae* state that they authored this brief in its entirety and that no party, other than the *amicus*

States private sector marine terminal operators (MTOs) and stevedores. NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, territories and commonwealths of the United States. The ports of the United States handle approximately 15 percent of the United States gross domestic product and NAWE member companies handle the majority of this cargo. The national and world economies are dependent on the efficient flow of maritime commerce through our facilities.

NAWE member companies are heavily regulated by the federal government through the admiralty/maritime jurisdiction of the federal government. The industry's workers' compensation is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. 901 *et seq.* (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act of 1998*, 46 U.S.C. App. 801 *et seq.* (*The Shipping Act*). The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, 46 U.S.C. 1300. The same federal admiralty/maritime jurisdiction that gives the federal government authority to regulate every aspect of the MTO/stevedoring industry also protects the industry from conflicting and inconsistent state laws. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

The industry has a long standing interest in maintaining clear and consistent boundaries between federal admiralty/maritime jurisdiction and state jurisdiction. *Amicus* submits

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curiae, its members and its counsel have made a financial contribution to the preparation and submission of this brief. Pursuant to Rule 37.2(a) letters of consent have been filed with the Clerk.

this brief to assist the Court in understanding how an expansive reading of the term "navigable waters" and phrase "waters of the United States" could blur federal/state jurisdictional lines leading to years of litigation in related areas of federal law that have otherwise been settled for decades or centuries.

SUMMARY OF THE ARGUMENT

The *Clean Water Act* (CWA) is a federal statute governing the use of "navigable waters" that are part of the "waters of the United States." 33 U.S.C. 1362(7). The constitutional authority for enacting the CWA comes from the Commerce Clause, Article I, Section 8, Clause 3 and the Admiralty Clause, Article III, Section 2, Clause 1. But once enacted, the CWA became part of the admiralty/maritime laws of the United States because it regulates the use of "navigable waters" which are "waters of the United States." Admiralty/maritime law and jurisdiction go hand in glove together. With one automatically comes the other. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995).

For almost 200 years, both the federal courts and Congress have used the term "navigable waters" and the phrase "waters of the United States" to define the boundaries of federal admiralty/maritime jurisdiction. The test for what constitutes "navigable waters of the United States" was outlined by this Court in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. 557, 563 (1870); *see also The Montello*, 87 U.S. 430 (1874). This test applies whether the

term "navigable waters" or phrase "waters of the United States" appears in statute or arises as part of a constitutional question. The term and phrase have been used in scores of federal statutes over the last 150 years. The legal test has always been the same—*The Daniel Ball* test—that flows from the Admiralty Clause of the Constitution.[2]

The answer to the question of whether a specific location is part of the navigable waters of the United States can only be YES or NO. A given location is either part of the navigable waters of the United States or it is not.

The answer to this question is wholly independent of the statute involved. The legal test for what constitutes navigable waters of the United States is today what it has always been—waters which are navigable in fact. The facts concerning what constitutes navigable waters of the United States may change over time as changes occur to waterways and ports. But the legal test—the constitutional test—of what constitutes "navigable waters" and "waters of the United States" should never change. That test is ingrained in our Constitution and not subject to amendment or modification by agency regulation.

Furthermore any expansion of what constitutes "navigable waters" or "waters of the United States" could have profound implications. The use of the navigable waters of the United States is under exclusive federal control. Land and those waters that are not "navigable waters" are subject to state

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[2] In dicta, this Court once indicated that the concept of what is "navigable waters" might vary from statute to statute. *Kaiser Aetna v. United States*, 44 U.S. 164, 170-1 (1979). However, even the *Kaiser Aetna* Court went on to find that the waters in question were "navigable waters" because they were navigable in fact. The better reading of the case law is: the substantive rules that apply to the "navigable waters of the United States" may vary from one statute to another, but the legal test of what constitutes the "navigable waters of the United States" is a constitutional test that cannot vary.

control. A holding that filling drainage ditches on Mr. Rapanos' land is placing fill into the navigable waters of the United States could significantly alter the boundary between federal and state jurisdiction. Such an overreaching of federal power should be avoided. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")

While the ends of achieving clean water may be just, the means employed by the executive branch of simply ignoring the plain and unequivocal language of the CWA can never be justified in a nation that is governed by the rule of law.

ARGUMENT

I. THE TERM "NAVIGABLE WATERS" AND PHRASE "WATERS OF THE UNITED STATES" MUST BE INTERPRETED IN LIGHT OF THE ADMIRALTY CLAUSE OF THE CONSTITUTION.

Other briefs in this case will undoubtedly explain in great depth that this case turns on the meaning of two words—navigable waters—and one phrase—waters of the United States—used in the *Federal Water Pollution Control Act Amendments of 1972*, 33 U.S.C. 1251 *et seq.*, (CWA). The question presented in this case could easily have been "Does the term 'navigable waters' in the CWA mean what it has always meant in every other legal context or can the Army Corps of Engineers give it a new and creative meaning never before contemplated?"

Amicus submits that these two words—navigable waters—were not simply words picked at random by Congress. Instead, Congress carefully selected two words that have a long and well established meaning under the Admiralty Clause of the United States Constitution. Article III, Section

2, Clause 1 ("The judicial Power shall extend . . . —to all Cases of admiralty and maritime Jurisdiction")(Admiralty Clause).[3] *Amicus* submits that the term "navigable waters" is an admiralty/maritime law term with a meaning long ago established by the courts and well known to Congress at the time the term was used in the CWA.

Not only did Congress use the traditional admiralty/maritime term "navigable waters," Congress went on to define the term "navigable waters" using traditional admiralty/maritime law language: "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). As will be outlined in some detail below, the definitional phrase "waters of the United States" further ties the CWA to traditional admiralty/maritime law.

Because the term "navigable waters" and phrase "waters of the United States" have a well established meaning—a meaning that flows from the Constitution—that term and phrase cannot be altered by agency regulation and must be given their normal and well established meaning under federal law.

II. ADMIRALTY CLAUSE BACKGROUND

When Congress enacted the CWA, Congress relied on the federal police powers[4] to control the use of "navigable

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[3] The Constitution uses the words admiralty and maritime without defining them. Although these two terms are closely related, the words are not synonyms. In England, the word maritime referred to cases arising upon the high seas, whereas admiralty meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. For purposes of this brief, *amicus* will refer to the "Admiralty Clause" to mean Article III, Section 2, Clause 1 of the Constitution and admiralty/maritime law and admiralty/maritime jurisdiction to refer to the body of federal law and federal jurisdiction that flows from the Admiralty Clause.

[4] The term "police powers" is used in this brief to mean the authority to place restraints on personal freedoms and property rights for the protection of the public safety, health and morals or the promotion of the public

waters." This Court has held that the constitutional source of congressional power over the use of "navigable waters" comes both from the Commerce Clause, Article I, Section 8, Clause 3 (Commerce Clause) and the Admiralty Clause. *Gilman v. Philadelphia*, 70 U.S. 713, 724-725 (1866) ("The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . .") The federal government has jurisdiction over the "navigable waters" of the United States independent of the Commerce Clause through the Admiralty Clause which implicitly contains three grants of power to the federal government:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

Romero v. International Term Co., 358 U.S. 354, 361-2 (1959) citing *Crowell v. Benson*, 285 U.S. 22, 55 (1932). Even if Congress had never enacted a single substantive law affecting the navigable waters of the United States, the use of those navigable waters of the United States would still be governed by federal law through the Admiralty Clause. If there were no federal statutes, the Constitution still left power

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convenience and general prosperity. Paraphrasing *Black's Law Dictionary* (Eighth Edition, 2004). Inherent in police powers is the right to prior restraint and the right to punish for conduct where no harm to a third party has yet occurred. Police powers are distinct from the right to provide a remedy to a private party after that private party has been injured.

to the federal courts to develop the substantive admiralty/maritime law.[5] *Romero*, 358 at 361-2.

Once Congress enacts a law governing the use of the navigable waters of the United States, that law becomes part of the substantive admiralty/maritime laws of the United States. This Court has often said: "With admiralty jurisdiction comes the application of substantive admiralty law." *Great Lakes Dredge & Dock*, 527 at 545; *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996); *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). The converse must also be true: With the application of substantive admiralty law comes admiralty jurisdiction. When the question of law is whether a location is part of the "navigable waters of the United States" that question is an admiralty/maritime law question and that question has a constitutional answer.

A. What is or is not "navigable waters" determines the boundaries of what falls within the scope of admiralty/maritime jurisdiction.

The question of what constitutes the "navigable waters of the United States" has always been intertwined with the scope of admiralty/maritime jurisdiction. For most of the history of this nation the jurisdictional test for admiralty/maritime torts was the simple bright line *situs* test outlined in *The Daniel Ball*.[6] As this Court often said "The traditional test for admi-

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[5] While not relevant to this case, a significant amount of the federal admiralty/maritime law is developed through international treaty. *United States v. Locke*, 529 U.S. 89 (2000).

[6] The admiralty/maritime jurisdiction applies to both torts and contracts. The jurisdictional test for contracts has traditionally been a nexus test. *The Jefferson*, 61 U.S. 393, 401 (1857) ("The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.")

ralty tort jurisdiction asked only whether the tort occurred on navigable waters. If it did, admiralty jurisdiction followed; if it did not, admiralty jurisdiction did not exist." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-2 (1995). *See also Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 253 (1972) ("If the wrong occurred on navigable waters, the action is within admiralty jurisdiction.")(citing *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813) (Story, J., on Circuit). *See also The Plymouth*, 70 U.S. 20, 36 (1866) ("Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance"). *See generally Great Lakes Dredge & Dock*, 513 U.S. 527 (1995) for a discussion of the evolution of admiralty/maritime tort jurisdiction.

Some members of this Court would return to this bright line rule for admiralty/maritime jurisdiction. *See Great Lakes Dredge & Dock*, 513 U.S. at 549 (Justices Thomas and Scalia concurring in judgment). What is relevant to this case is that the starting point for determining federal admiralty/maritime jurisdiction under any test ever used by the Court is whether the location is "navigable waters of the United States." Therefore, any shift in what constitutes the "navigable waters of the United States" potentially could shift the admiralty/maritime jurisdictional of the United States.

B. Federal power over the use of the navigable waters of the United States is exclusive.

States have extremely limited police powers over the use of navigable waters. The police powers over the use of the navigable waters of the United States is vested exclusively in the federal government through the Admiralty Clause:

> By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress

> intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The New Jersey Steam Navigation Company, v. The Merchants' Bank or Boston, 47 U.S. 344, 390 (1848).

> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states-not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

Knickerbocker at 160-161, quoting from *The Lottawanna*, 88 U.S. 558, 574-5 (1874).

The constitutional principle that federal admiralty/maritime jurisdiction over the use of the navigable waters of the United States is exclusive is also reflected in statute. One of the first actions of the first Congress was to create the lower federal courts in The Judiciary Act of 1789:

> And be it further enacted, That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of

> ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

The Judiciary Act of 1789: An Act to establish the Judicial Courts of the United States, 1 Stat. 73, Section 9 (September 24, 1789) (The Judiciary Act). The admiralty/maritime components of *The Judiciary Act* are now codified in Title 28 of the United States Code:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Admiralty, maritime and prize cases, 28 U.S.C. § 1333. The second phrase of clause (1)—"saving to suitors in all cases all other remedies to which they are otherwise entitled"—is referred to as the "saving to suitors" clause and has lead to some confusion over what jurisdiction states retain. The modern view is that states are left with two authorities:

First, states are authorized to have their courts accept jurisdiction over admiralty/maritime cases. *See Romero.* Concurrent federal/state court jurisdiction allows state courts to hear admiralty/maritime claims just as they hear most other federal questions. But state court must apply federal admiralty/maritime law, not state law, when sitting as admiralty courts.

Second, states are authorized to provide remedies to suitors. Originally, this authority was limited to rights that were available at common law at the time the Constitution was

adopted. In more recent years, this right has been amended by Congress to include remedies that individuals "are otherwise entitled" where no federal admiralty/maritime remedies are otherwise available. A state may provide remedies "so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561 (1954) *quoting Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

As a bottom line, once admiralty/maritime jurisdiction attaches, the Constitution and laws of the United States severely limit state powers. *United States v. Locke*, 529 U.S. 89 (2000) ("The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.") citing *The Federalist* Nos. 44, 12, 64.

Declaring a location to be part of the navigable waters of the United States has the corollary effect of removing state police powers over the use of that location. If the navigable waters of the United States are expanded in scope, the admiralty/maritime jurisdiction also expands to the exclusion of the states.

C. Federal power over the use of the navigable waters of the United States is nondelegable.

Expanding the definition of what constitutes the "navigable waters of the United States" has far more implications that would an expansive reading of other statutory language. Not only is federal power over the use of the "navigable waters of the United States" exclusive as outlined above in section B, once federal admiralty/maritime power attaches, it cannot be delegated to the states. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) ("Congress cannot transfer its legisla-

tive power [over admiralty/maritime matters] to the states-by nature this [admiralty/maritime power] is non-delegable.")

As background to this proposition, when workers' compensation statutes were first enacted, states attempted to apply their workers' compensation laws to work place injuries that would otherwise have been maritime torts. This Court struck down this aspect of state workers' compensation laws in *Southern Pacific Rail Co. v. Jensen*, 244 U.S. 205, 217 (1917), rejecting an argument that such laws could be applied under the saving to suitors clause discussed above. After *Jensen*, Congress amended the saving to suitors clause to expressly authorize states to apply their workers' compensation laws to maritime workplace torts. In *Knickerbocker*, this Court again ruled against applying state workers' compensation laws in the admiralty/maritime context holding that power under the Admiralty Clause is "non-delegable." *Knickerbocker*, 253 at 160. Ultimately, Congress decided to cover maritime injuries under a federal workers' compensation statute. *LHWCA*, 33 U.S.C. 901 *et seq.* To this day, admiralty/maritime injuries are covered by federal law.

While this Court has not since revisited the question of delegation under the Admiralty Clause, the Court has repeatedly supported the principle that was the underpinning of the holding in *Knickerbocker*:

> The fundamental interest giving rise to maritime jurisdictions is "the protection of maritime commerce," and we have said that that interest cannot be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct."

Sisson v. Ruby, 497 U.S. 358, 367 (1990), quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982).

The holding that Commerce Clause powers are delegable, while Admiralty Clause powers are non-delegable is consistent with the structure of the Constitution. As a general rule,

Congress can delegate powers that the Constitution otherwise gives to Congress. The power to regulate commerce is found in Article I of the Constitution and as such, is a power of Congress. Congress cannot delegate powers that the Constitution assigns to the other two branches of the federal government. Since the Admiralty Clause is a federal power given first and foremost to the federal courts in Article III, Congress is without authority to place any of admiralty/maritime power in the states—i.e., it is non-delegable.

III. THE EXECUTIVE BRANCH IS WITHOUT AUTHORITY TO INTERPRET A TERM THAT THE COURTS HAVE ALREADY INTERPRETED.

Amicus submits that any Executive Branch interpretations of the term "navigable waters" should be irrelevant to the Court's inquiry. Executive branch regulation on this point should not even be considered by the Court. *Amicus* advances two grounds for this position: First, no executive branch interpretation of the term "navigable waters" is permissible because the meaning of the term was clear and well established at the time of enactment of the CWA. Second, because the term "navigable waters" and phrase "waters of the United States" have constitutional importance, it is the courts and not the executive branch that have the sole authority to establish the appropriate legal test.

A. No alternative executive branch interpretation of a term is allowed when the interpretation of the term is clear at the time of enactment.

The question of when executive branch regulations are relevant to a judicial enquiry is governed by the Administrative Procedures Act, 5 U.S.C. 551 *et seq.* (APA):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

> law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .

APA, 5 U.S.C. § 706(2). Under the APA, it is the responsibility of the courts to decide questions of law and interpret constitutional and statutory provisions. *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") The Court addressed this issue in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (internal citations omitted).

As has been demonstrated above, the intent of Congress when it used the term "navigable waters" and the phrase "waters of the United States" could not have been clearer. It would be hard to find other words that have been more

thoroughly defined over our nation's history. In the language of *Chevron*, once Congress used the term "navigable waters" and the phrase "waters of the United States," "that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 at 842.

While the so-called *Chevron* doctrine encompasses a general principle of deference to agency decisions, an agency is not automatically entitled to deference:

> But the principle [of deference] has its limits. Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question and then only if the administrative interpretation is reasonable.

Presley v. Etowah County Comm'n, 502 U.S. 491, 508-509 (1992) (emphasis added) citing *Chevron*, 837 at 842-844. In the case at hand, Congress has clearly expressed its intent by using a term that has a long established meaning. Any other interpretation that is inconsistent with that long established meaning is simply not reasonable.

B. The Courts are the sole source of interpreting what is and is not a navigable water.

Furthermore, the Constitution has delegated to the Courts the authority to define the legal test for what is and is not "navigable waters" and what are and are not the "waters of the United States." Congress is without authority to take that power away from the courts and delegate that power instead to the Executive Branch or usurp that power for itself. *The Steamer St. Lawrence*, 66 U.S. 522, 527 (1862):

> This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same

> territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; *but certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.* And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.

(emphasis added.)

In further support of this proposition consider this hypothetical—Congress gives the Executive Branch statutory authority to conduct "reasonable searches and seizures" along with authority to issue regulations. Could it seriously be argued that the Executive Branch would be free to issue regulations defining what is an unreasonable search and seizure in a way that violated the meaning given to that term by the courts? Would such regulation be entitled to deference? The answer is of course not. Likewise, no Act of Congress can give a federal agency the right to "overrule" this Court's legal test for what constitutes the "waters of the United States."

To the extent an administrative agency conducts a fact based adjudication and determines that certain waters are or are not navigable, such a determination may be entitled to deference under the *APA*. But only the federal courts have to power to define what legal test will be used to establish what waters are the "waters of the United States." The Constitution delegated that power to the federal courts and Congress is without constitutional authority to give that power to the Executive Branch.

Thus, for the reasons outlined above, administrative regulations on what constitutes "navigable waters" and "waters of

the United States" are irrelevant to this inquiry. The Court should instead look to its own decisions when deciding this case and the controlling authority is *The Daniel Ball* and it progeny.

IV. THE FEDERAL COURTS AND CONGRESS HAVE CONSISTENTLY USED THE TERM "NAVIGABLE WATERS" AND PHRASE "WATERS OF THE UNITED STATES" IN THEIR ADMIRALTY/MARITIME CONTEXT.

For most of the history of this nation, the federal courts and Congress have used the term "navigable waters" and the phrase "waters of the United States" to delineate the boundary between federal admiralty/maritime jurisdiction and state non-admiralty jurisdiction. The question repeatedly confronted by the Court is whether a given location in our nation is part of the "navigable waters of the United States." In the early case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court discussed what constitutes "waters of the United States:"

> It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their use, for those purposes, seemed to be entrusted to the exclusive power of Congress.

Gibbons at 21. The Court went on to conclude what constitutes "waters of the United States" is a function of whether or not those waters are navigable:

> It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned. Their use is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters.

Gibbons at 22. That principle that "navigable waters" are the "waters of the United States" has been a bedrock principle of

federal law ever since. The Court outlined the test for what are and are not "navigable waters" of the United States in *The Daniel Ball*, 77 U.S. 557 (1870) and *The Montello*, 87 U.S. 430 (1874). Of significance to this case is that *The Daniel Ball* involved the interpretation of a statute that used the phrase "navigable waters of the United States:"

> The act of July 7th, 1838, provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon the bays, lakes, rivers, or other navigable waters of the United States . . . .

The Daniel Ball at 558. The Court went on to address the issue of what constitutes "navigable waters of the United States:"

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball at 563. A few years later in *The Montello*, 87 U.S. 430 (1874), this Court went on to further define what is and is not part of the "navigable waters of the United States:"

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public high-

> way. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The Montello at 441-2.

Since *The Daniel Ball*, the same test has been used by the federal courts to evaluate what constitutes "navigable waters," whether evaluating statutes or constitutional questions. In *Economy Light & Power Co. v. U.S.*, 256 U.S. 113 (1921), this Court interpreted a statute using the term "navigable waters" and the phrase "navigable waters of the United States." This Court as always looked to *The Daniel Ball*:

> The Circuit Court of Appeals, in passing upon the question of navigability, correctly applied the test laid down by this court in *The Daniel Ball* and *The Montello*; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation

be open at all seasons of the year, or at all stages of the water.

Economy Light at 121-2. *See also U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940):

> It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the navigable waters of the United States open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is "absolute."
>
> The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers." It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.
>
> The navigability of the New River is, of course, a factual question but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the

> Western mountains. The tests as to navigability must take these variations into consideration.

Appalachian Electric at 404-6.

At the time Congress used the term "navigable waters" in the CWA and defined that term to be the "waters of the United States," Congress knew what that term meant. Congress has used that term for over 100 years in statute after statute. This Court has interpreted that term in statute after statute and in numerous constitutional cases so there was no question of the meaning.

One definition of insanity is doing the same thing over and over again and expecting a different result. It would be insanity for Congress to have used a term that this Court had interpreted the same way over and over again and expect the Court to reach a different conclusion. If Congress had intended a different jurisdictional reach for the CWA, Congress undoubtedly would have used a different term to define that jurisdictional reach.

A. Congress repeatedly used the term "navigable waters" and the phrase "navigable waters of the United States."

Not only has the term "navigable waters" and the phrase "waters of the United States" been used for over 100 years in statutes, the term and phrase are still found in numerous other federal statutes today. *See* Title 33 of the United States Code generally covering Navigation and Navigable Waters, including 33 U.S.C. 1 ("It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States . . ."); 33 U.S.C. 10 ("All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."); 33 U.S.C. 59b ("Bayou Terrebonne west of Barrow Street and Bayou LeCarpe west of the Intracoastal Waterway in the city of

Houma, State of Louisiana, are declared to be not navigable waters of the United States within the meaning of the Constitution and laws of the United States."); 33 U.S.C. 401 ("It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States . . ."); 33 U.S.C. 414(a) ("Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered . . ."); 33 U.S.C. 902(4) ("The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States . . ."); 33 U.S.C. 1222(5) (" 'Navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988.").[7]

See also Title 46 of the United States Code generally covering Shipping including 46 U.S.C. 2101(17a) (" 'navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988."); 46 U.S.C. 4301(c) ("Until there is a final judicial decision that they are navigable waters of the United States, the following waters lying entirely in New Hampshire are declared not to be waters subject to the jurisdiction of the United States within the

[7] The conclusion that the term "navigable waters" must be evaluated in light of traditional admiralty/maritime law principles is also supported by the CWA's placement in the United States Code. Many of the other federal environmental statutes are found in Title 42 of the United States Code governing The Public Health and Welfare. *See* solid waste statutes in 42 U.S.C. Chapter 82 and clean air statutes in 42 U.S.C. Chapter 85. The Clean Water Act on the other hand is found in Title 33 of the United States Code regulating Navigation and Navigable Waters. Title 33 contains a significant amount of the admiralty/maritime laws of the United States.

meaning of this section . . ."); 46 U.S.C. 4701(3) (" 'navigable waters of the United States' means waters of the United States, including the territorial sea."); 46 U.S.C. 6101(d)(1) ("This part applies to a foreign vessel when involved in a marine casualty on the navigable waters of the United States."); 46 U.S.C. 8304(g) ("A foreign vessel to which the convention described in subsection (b) of this section applies, on the navigable waters of the United States, is subject to detention under subsection (f) of this section, and to an examination that may be necessary to decide if there is compliance with the convention."); 46 U.S.C. 11108(2) ("This subsection applies to an individual . . . (B) who performs regularly-assigned duties while engaged as a master, officer, or crewman on a vessel operating on the navigable waters of more than one State.")

These examples are by no means an exhaustive list of federal statutes that use the term "navigable waters" and/or phrase "waters of the United States." Instead, they simply represent a sampling.

Over and over again, Congress has used the term "navigable waters" and/or the phrase "waters of the United States" to define the jurisdictional scope of federal statutes. Congress has repeatedly used its constitutional authority to regulation "navigable waters" to enact such legislation. Congress has used the term "navigable waters" and the phrase "waters of the United States" consistently and repeatedly in the traditional *The Daniel Ball* sense: Waters must be regarded as navigable in law which are navigable in fact and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Even the Army Corps of Engineers initially used a traditional definition of "navigable waters" in the early regulations for the CWA:

> Indeed, the Corps' original interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a)'s navigable waters to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 168 (2001). There is simply no evidence that Congress intended "navigable waters" in the CWA to mean anything other than its traditional and ordinary meaning. Therefore, the term must be given its traditional and ordinary meaning.

V. FEDERAL RESPONDENT'S POSITION

It is against this long judicial and statutory history under the Admiralty Clause that the federal respondent's position must be evaluated. The federal respondent asks this Court to ignore the almost 200 year of this Court's holdings and instead create a new category of "navigable waters." The federal respondent calls the "navigable waters" that are navigable in fact "traditional navigable waters." Brief for the United States in Opposition to Certiorari in *Rapanos v. United States*, No. 04-1034, 2-3, footnote 1. The government then asks the Court to recognize a new category of "navigable waters" under the CWA—navigable waters that are *not*

navigable in fact. Thus, if the government prevails there will be two categories of "navigable waters" under federal law: "*navigable* navigable waters" and "*non-navigable* navigable waters." The country will be confronted with "*water* waters of the United States" and "*waterless* waters of the United States."

In reviewing the federal respondent's position in this case, amicus is reminded of something that former Senator Daniel Patrick Moynahan often said: In a democracy, we each are free to have our own opinions, but we are not free to make up our own facts. In this case, the federal respondent wants to make up its own facts about what is in fact navigable. If the federal respondent prevails, it will require something like the Ministry of Truth from George Orwell's "1984" to explain to the public how dry land is in fact part of the "navigable waters of the United States." Maybe they can paraphrase the pigs in Orwell's "Animal Farm" and explain that: All land in the United States is navigable by maritime vessels, but some land is more navigable than other.[8]

The federal respondent's position in this case begs the question of whether the term "navigable waters" either (1) should be redefined under federal admiralty/maritime laws to include "*non-navigable* navigable waters;" or in the alternative (2) could be redefined under other federal admiralty/maritime laws to include "*non-navigable* navigable waters." Could a worker who got injured filling in the "non-navigable navigable waters" on Mr. Rapanos' land seek compensation under the federal LHWCA because the worker was "employed in maritime employment, in whole or in part, upon the navigable waters of the United States?" 33 U.S.C. 902(4). Or maybe Mr. Rapanos could seek federal harbor maintenance funds to maintain his land since his land would

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[8] The actual quote is "All animals are equal but some animals are more equal than others."

be part of the "navigable waters of the United States." When the state wants to exercise its police powers over Mr. Rapanos' land, can he raise the affirmative defense that the state no longer has jurisdiction over his land use because his land is part of the "navigable waters of the United States." The possibilities of new applications of old federal laws are endless if the Court recognizes the existence of "*non-navigable* navigable waters."

There is absolutely no evidence that Congress intended such an absurd result under any federal statute including the CWA. Absent some clean, unequivocal expression by Congress to the contrary, the Court should conclude that Congress intended "navigable waters" to mean the same thing the term has meant in every other context it has been uses since the adoption of the Constitution. What is navigable in law is what is navigable in fact.

CONCLUSION

For the reasons stated above, amicus urges the Court to declare that what constitutes the "navigable waters of the United States" is a question of fact, defined by the Constitution under the Admiralty Clause. The test outlined in *The Daniel Ball* is the test that should be used whenever Congress defined the jurisdiction scope of a statute to be "navigable waters" and/or "waters of the United States."

Respectfully submitted,

FRANCIS EDWIN FROELICH *
CHARLES T. CARROLL, JR.
CARROLL & FROELICH, PLLC
919 18th Street, NW
Suite 901
Washington, DC 20006
(202) 587-4850

* Counsel of Record

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In the

Supreme Court of the United States

JOHN A. RAPANOS *et ex, et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KAREN R. HARNED
ELIZABETH GAUDIO
NFIB LEGAL FOUNDATION
1201 F Street, NW
Washington, DC 20004
(202) 554-9000

ROBERT R. GASAWAY
Counsel of Record
ASHLEY C. PARRISH
ERIN E. MORROW
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for the Amicus Curiae

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' regulations promulgated pursuant to the Clean Water Act lawfully and constitutionally vest the Army Corps with broad, land-use decisionmaking authority over essentially any and every wetland in the United States.

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 States. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers. NFIB represents small employers who make up an important segment of the business community. Members typically have about five employees and report gross sales of $350,000; the average member nets $40,000 to $50,000 annually. These small businesses face challenges and opportunities that distinguish them from publicly traded corporations.

NFIB members have an important interest in these cases because small businesses continue to bear a disproportionate share of the federal regulatory burden associated with environmental regulations. A September 2005 study commissioned by the Small Business Administration reveals that environmental and tax compliance regulations are the main cost drivers in determining the severity of the disproportionate impact on small firms. Compliance with environmental regulations alone costs small firms 364 percent more than large firms.

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[1] Both petitioners and respondents have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The five years following *Brown v. Board of Education*, 349 U.S. 294 (1955), are often termed years of "massive resistance" to that decision's holding. In similar fashion, the five years following this Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), might be termed years of "passive resistance"—both to *SWANCC*'s holding itself and to any serious attempt to reconcile state with federal authority as regards wetlands protection and water-quality preservation. The Army Corps of Engineers ("Army Corps" or "Corps") initially considered making a good-faith attempt to reconcile its wetlands regulations with *SWANCC*'s statutory and constitutional teachings. *See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* 68 Fed. Reg. 1991 (Jan. 15, 2003). But in the end the Corps retreated from that objective; hunkered down with a modest redeployment of what was left of its pre-*SWANCC* legal position; and failed to make meaningful changes to its regulatory program. With the notable exception of the Fifth Circuit, the lower federal courts have acquiesced, consistently upholding applications of Army Corps regulations that *SWANCC* rendered unlawful.

These consolidated cases present a tailor-made opportunity for the Court to vindicate the authoritative status of *SWANCC* in particular and the binding nature of this Court's decisions more generally. In two separate but equally misguided rulings below, the Sixth Circuit failed to acknowledge that the fundamental assumptions underlying the Corps' regulations—not merely the regulatory provision aimed at migratory birds—were undermined by *SWANCC*. More specifically, the Sixth Circuit overlooked or ignored that *SWANCC* forecloses giving deference to the Corps' administrative interpretations and that the motive force

driving *SWANCC*'s result was this Court's constitutionally essential solicitude for preserving the States' prerogatives over land-use decisionmaking.

SWANCC drew a landmark jurisprudential line reconciling federal interests in the navigability and quality of "waters of the United States" with the States' concededly *exclusive* authority to make land-use decisions for wetlands, dry land, and other property outside the federal ambit. Noting the important federalism aspects of such a reconciliation, *SWANCC*'s reading of the Clean Water Act, while not comprehensive, established at a minimum that the Corps lacked land-use authority over "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168 (emphasis in original). The regrettable "passive resistance" to *SWANCC* has undoubtedly been caused in part by governmental chaffing at the bridle of law. But that resistance has also been partly caused by genuine confusion over what suffices to confer Clean Water Act jurisdiction. This submission, in addition to underscoring the practical importance of these cases to small businesses, seeks to dispel this confusion by defining and distinguishing the two types of constitutional and statutory authority the Army Corps exercises—a distinction that thus far has largely eluded the lower courts.

Courts have typically wandered astray by failing to appreciate that the Clean Water Act provision at issue here, section 404(a), governs "the *discharge* of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); (emphasis added). As *SWANCC* indicated, "*discharges* of dredged or fill material" can logically come in only two relevant varieties—(i) discharges directly involving highways of water-borne commerce, such as the Mississippi River System or St. Lawrence Seaway; and (ii) discharges involving, not great aquatic highways, but other "waters of the United States" used in interstate commerce. *See* 33 U.S.C. § 1362(7). This distinction,

critical for both constitutional and statutory analysis, is one between, on the one hand, the asserted federal authority to engage in *land-use decisionmaking* for parcels bordering major commercial waterways and, on the other hand, the very different authority to enforce *water-quality preservation* or *water-pollution prevention* rules.

As explained in detail below, the Sixth Circuit confused these separate headings of federal authority and, as a result, lapsed into error. Most importantly, the Sixth Circuit mistakenly approved the Corps' assertion of authority to apply land-use decisionmaking regulations to the *Rapanos* and *Carabell* parcels—lands not "actually abutting" commercial waterways. By subjecting non-abutting wetlands to federal land-use regulations that can lawfully apply, if at all, only to parcels bordering the Nation's great commercial waterways, the Sixth Circuit departed from *SWANCC*, misapplied the Act, and permitted the Corps to exceed its authority under the Constitution.

ARGUMENT

I. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT RENDERS THE ACT UNCONSTITUTIONAL.

These cases do not challenge the power of the Army Corps to regulate land use along the borders of major federal waterways. Nor do they challenge the power of federal agencies to regulate activities causing pollution of the Nation's water resources. What they most assuredly do challenge is the Corps' bid to arrogate authority over land-use decisionmaking for any and every wetland in the Nation. Even putting to one side the Clean Water Act, the Constitution forbids any such exercise of federal authority.

A. The Corps' Regulations Seek To Impose Nationwide Land-Use Requirements On A Vast Array Of Privately Owned Wetlands.

The Corps' regulations define the "waters of the United States" subject to the Corps' wetlands permitting requirements in the most expansive way conceivable. Specifically, the regulatory definition encompasses "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). Of the many items on this lengthy listing, "wetlands" is the only one carrying a separate regulatory definition. The Corps' regulations provide: "[t]he term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency or duration to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* § 328.3(b). The Corps further extends this already liberal definition to cover "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." *Id.* § 328.3(a)(7). And section 328.3(c) of the Corps' regulations goes further still: defining "adjacent" as "bordering, contiguous, or neighboring," and then adding a proviso stipulating that even "[w]etlands *separated from* other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c) (emphasis added).

Having asserted jurisdiction over any plot wet enough "to support a prevalence of vegetation typically adapted for life in saturated soil conditions," the Corps and the United States Environmental Protection Agency ("EPA") proceed to make permitting decisions turn essentially on land-use considerations, such as whether aesthetic and ecological considerations warrant keeping these damp plots in a

perpetual condition of dampness. *See, e.g.*, 40 C.F.R. § 230.10 (prohibiting the discharge of pollutants that have significantly adverse effects on, among other things, "aesthetic" values). EPA regulations thus require that the Corps consider "the characteristics of the substrate at the proposed disposal site," as well as the "possible loss of environmental characteristics and values," including whether the discharge might affect "the complex physical, chemical, and biological characteristics of the substrate" or affect "bottom-dwelling organisms." *Id.* § 230.20(b). The regulations provide in particular that discharges may not adversely affect wildlife, *see id.* § 230.10(c)(1), including "loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem." *Id.* § 230.32(b).

In practice, the Corps has interpreted and applied its regulations broadly to exercise control over whether to allow or prohibit the dredging or filling of any and every wetland in the Nation. The Corps has consistently employed its nationwide regulations to prevent private landowners from making any improvements to wetland parcels, and has used its permitting authority to prevent and control development. In sum, the Corps' regulations applied in this case seek to achieve land-use goals, weigh land-use values, and drive land-use decisionmaking.

B. Under Our System Of Government, Land-Use Planning Is The "Quintessential" Function Of The States.

In stark contrast to the Corps' federal program of nationwide land-use regulation, this Court has often remarked that "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979); *see also Hess v. Port Auth. Trans-Hudson Corp.*,

513 U.S. 30, 44 (1994) (same); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (recognizing "the authority of state and local governments to engage in land use planning"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, the Court has gone so far as to declare that "regulation of land use is perhaps the *quintessential* state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). The Court accordingly has deemed land-use controls through zoning as "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). In a passage now commonplace in the Court's decisions, Justice Jackson emphasized that the Constitution's allocations of "differentiated governmental power" need not undermine the integration of these "dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion). And so experience teaches with respect to the Constitution's reservation of land-use decisionmaking authority as a province of state and local governments.

States historically have taken leading roles in translating environmental science into effective conservation programs. Most relevant here, States have enacted extensive wetlands protection regimes, ranging from traditional permitting systems to incentive programs, "critical area" designations, and buffer zone requirements. This regulatory diversity reflects not only individual state preferences, but also "the [biological] diversity of freshwater wetland types across the nation." Jonathan H. Adler, *Wetlands, Waterfowl and The Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 49-50 (1999) (internal citation omitted) (noting that "many state supplemental programs deliberately exceed stringent federal wetlands regulations"). State efforts in the wetlands protection arena are further supplemented by wetlands protection measures enacted by thousands of local

governments. *See id.* at 48-52 (summarizing the history of state wetland regulation); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005). State and local wetlands programs thus exemplify Justice Brandeis's observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nearly a decade before the Clean Water Act, Massachusetts embarked on the first statewide wetlands protection experiment. In 1963, Massachusetts enacted a pioneering program requiring state-issued permits as a precondition to filling or dredging of coastal wetlands. *See* Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, repealed by 1972 Mass. Acts 784, § 2, superceded by Mass. Gen. Laws ch. 131, § 40 (1991). Massachusetts extended these protections to inland wetlands two years later—a full decade before the Corps began regulating wetlands. *See NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (directing that wetlands be regulated under section 404). Although the Massachusetts law was the first state-level statute, it was far from the first local government initiative to protect wetlands. Rather, the Massachusetts law itself was "based on a number of local zoning permit requirements already to be found in coastal states." Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States* 255 (Ass'n of State Wetland Managers, 1985).

Nor did Massachusetts act alone. Other States, including Connecticut, Georgia, and Washington, all took active wetlands protection measures in the 1960s. In fact, by the time federal wetlands regulations were promulgated in 1975,

every coastal State but one had adopted coastal wetlands protections, and eleven States had passed statutes to protect freshwater wetlands as well. *See* Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers, 1994); *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578-79 (2001) (discussing substantial environmental progress achieved by the States prior to 1970).

These fruitful, longstanding wetlands protections are now threatened by the Clean Water Act's growing displacement of state and local land-use law. As of 2000, the Corps was approving approximately 85,000 permits each year for the use or modification of designated wetlands. *See* Release No. PA-00-05, *U.S. Army Corps of Engineers Announces Replacement Nationwide Permits*, available at http://www.hq.usace.army.mil/cepa/releases/nationwidepermits.htm. (visited on December 1, 2005). Notwithstanding these thousands of approvals, the Corps regularly brings enforcement actions against landowners, large and small, for actions such as building vacation homes. *See Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Robert McMackin) (describing the Corps' determination that construction of a vacation home on a third of an acre lot violated federal wetlands regulations).

After *SWANCC*'s announcement of limits on federal regulatory authority, the States stood poised, not to abandon their wetlands to out-of-control development, but to repatriate wetlands protections back to the levels of government closest to the citizenry. At least 19 states responded to *SWANCC* "by either enacting or recommending the enactment of laws" designed to protect wetlands that might no longer be subject to federal jurisidiction. Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31

ENVTL. L. REP. 11079, 11085 (2001); *see also* Caleb A. Jaffe, *Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says About The Future Of Environmental Regulation*, 20 VA. ENVTL L.J. 329 (2001). That is, as this Court "restricted federal regulatory jurisdiction over wetlands," the States began to take up the slack by expanding their own "wetland protection." Jonathan H. Adler, *Letting Fifty Flowers Bloom: Transforming The States Into Laboratories Of Environmental Policy*, available at http://www.federalismproject.org/masterpages/environmen t /flowers.pdf (visited on December 1, 2005). To be sure, the Corps' passive resistance to *SWANCC*—and the resulting ambiguity as to the ultimate contours of federal wetlands protections—may have "discourage[d] states from filling the gaps." Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering The Federal Role In Environmental Protection*, 55 CASE W. RES. L. REV. 93, 112 (2004). But this hesitancy is unsurprising given the uncertainties as to "how much of a gap" ultimately would be left to fill. *Id.* Precisely because "state governments are not likely to squander scarce resources duplicating federal regulations," the Corps' passive resistance and the resulting "lack of clear boundaries on federal regulation" have likely resulted in "lower levels of environmental protection." *Id.* at 112-13.

C. The Corps' Regulations Violate Constitutional Federalism Principles.

In light of States' wetlands-preservation authority, experience, and track record of success, the *de facto* displacement of state and local land-use decisions represented by the Corps' nationwide, 85,000-permit-strong, land-use program constitutes an unwise, as well as unconstitutional, departure from our structure of government. This Court recognized in *Gregory v. Ashcroft* that the "federalist structure of joint sovereigns preserves to the people numerous advantages." 501 U.S. 452, 458 (1991).

Accordingly, the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests," *Younger v. Harris*, 401 U.S. 37, 44 (1971), needs ever to recall that it exists as a government of defined and enumerated powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.); The Federalist No. 45 (James Madison).

This Court recognized in *United States v. Lopez*, 514 U.S. 549 (1995), and in *United States v. Morrison*, 529 U.S. 598 (2000), and, most recently, in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), that the scope of congressional power under the Commerce Clause, while broad, is necessarily limited by the fact that the federal government is one of enumerated powers. The Commerce Clause authorizes Congress to regulate only (i) the "channels of interstate commerce;" (ii) the "instrumentalities of interstate commerce or persons and things in interstate commerce;" and (iii) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59. As applied to the *Carabell* and *Rapanos* parcels, however, the Corps' regulations simply cannot be squared with these minimum constitutional requirements. To be sure, wetlands bordering commercial waterways might conceivably be deemed subject to federal jurisdiction as part and parcel of those waterways—that is, as part and parcel of "instrumentalities of interstate commerce." *Id.* at 558 (stating that "instrumentalities" category includes statutory provisions applicable to "aircraft" and "vehicles used in interstate commerce") (citations omitted). But neither the *Carabell* parcel nor the *Rapanos* parcel borders a commercial waterway. As applied here, the Corps' regulations may be upheld, if at all, only as regulations of "activities that substantially affect interstate commerce."

Lopez and *Morrison* establish that regulatory programs are constitutional on "affecting commerce" grounds only where the regulatory regime focuses on economic endeavors, *Lopez*, 514 U.S. at 560; includes an "express jurisdictional

element" limiting its reach to commercial activities, *id*; or contains detailed legislative or statutory findings describing effects on commerce that otherwise might not be "visible to the naked eye." *Id.* at 562. As further described below, however, the regulation of commercial enterprise—voluntary exchanges of goods or services for value—is not the focus of the Corps' regulatory program; instead, the program functions as a sort of national zoning board governing land uses for virtually every damp plot of ground. Moreover, neither the Clean Water Act nor the Corps' regulations contain an express jurisdictional element limiting the Act's reach to proposed "discharges" having "a substantial effect on interstate commerce." *Id.* at 560. Finally, neither the Act nor its legislative history contains "express congressional findings regarding" the commercial effects of transferring land-use decisionmaking by state and local governments to the Army Corps in Washington. *Cf. Morrison*, 529 U.S. at 612. As this Court noted in *SWANCC*, the Act's legislative history gives no indication that Congress intended to exercise authority over wetlands not bordering commercial waterways, much less that Congress descried otherwise hidden economic benefits to a centralized, nationwide, 85,000-permit-strong, land-use program. *See SWANCC*, 531 U.S. at 168 n.3.

The Corps' statutory interpretation is additionally infirm because it sweeps broadly into areas of traditional state authority. *See Morrison*, 529 U.S. at 613. Instead of recognizing "any limitation on federal power" in the area of local land-use regulation, *Lopez*, 514 U.S. at 564, the Corps purports to regulate even the most basic acts by landowners, including "the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee." *Final Notice of Modification of Nationwide Permit 29 For Single Family Homes*, 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999) (providing final notice of modification of permits

involving single family housing). In fact, the Corps asserts jurisdiction over even trivial activities: "[w]alking, bicycling or driving a vehicle" through a wetland all might fall within the Corps' jurisdiction because all of these activities could result in "discharge of dredged material." *Clean Water Act Regulatory Programs*, 58 Fed. Reg. 45,008; 45,020 (Aug. 25, 1993). Under existing regulations, the Corps has even required permits for residential construction impacting closet-sized (26 square feet) and recreation-room-sized (400 square feet) parcels of wetlands. *See* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994).

If this Court were "to adopt the Government's expansive interpretation," then "hardly a [parcel of] land would fall outside the federal statute's domain." *Jones v. United States*, 529 U.S. 848, 857 (2000). The Court accordingly should decline the Corps' invitation—accepted by the Sixth Circuit—to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. "Congress may regulate non-economic interstate activities *only* where the failure to do so 'could ... undercut' its regulation of interstate commerce." *Gonzales*, 125 S. Ct. at 2218 (J. Scalia, concurring) (citing *Lopez*, 514 U.S. at 561) (emphasis added). Here, however, the Corps' program of land-use regulation has nothing to do with "commerce" or any sort of "economic enterprise," however broadly one might define those terms. *Lopez*, 514 U.S. at 561. Nor is the Corps' regulatory regime an essential part of "a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales*, 125 S. Ct. at 2210 (quoting *Lopez*, 514 U.S. at 561).

In sum, the Army Corps' permitting program needlessly injects federal regulatory authority into all manner of

traditional, local activity without regard to the commercial nature or economic effects of those activities. State and local land-use agencies that have carefully reviewed the likely impacts of proposed landowner improvements to wetlands have become distressingly accustomed to seeing their considered decisions vetoed by federal agencies that admit no need to tie those vetos to commercial objectives. The Corps' interpretation of the Clean Water Act unwisely and unconstitutionally shutters the very state laboratories that have produced significant pioneering achievements in wetlands protection.

II. THE SIXTH CIRCUIT'S EXPANSIVE READING OF THE CLEAN WATER ACT CANNOT BE SQUARED WITH SWANCC.

This Court's holding in *SWANCC* is the beginning and end of this case: the text of the Clean Water Act does not remotely invite the Corps to invade traditional state prerogatives over land-use decisionmaking. Instead of recognizing the significant constitutional federalism concerns presented in, and clear statutory text governing, this case, however, the Sixth Circuit gave unlawful deference to the Corps' administrative interpretation and wrongly upheld the Corps' challenged regulations.

A. The Clean Water Act Does Not Prohibit The Employment Of Fill Materials For Purposes Of Improving Privately Owned Parcels Of Land.

In cases like this one where the federal government seeks to interfere in matters of local concern so as to "upset the usual constitutional balance of federal and state powers," it is "incumbent upon the federal courts to be certain of Congress'[s] intent." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). When Congress intends to intrude on "the usual constitutional balance of federal and state powers," it should clearly state its intention to do so. *Id.* at 460.

This venerable principle takes on added force when courts are asked to construe an *administrative interpretation* of the law. Courts should not "needlessly reach constitutional issues" nor presume that Congress "casually authorizes administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73. Deference that might otherwise be due under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is simply not applicable in cases where, as here, an agency interpretation raises grave constitutional concerns. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As this Court has emphasized, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," there must be a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (quoting *DeBartolo*, 485 U.S. at 575).

As noted above, land-use development and control has long been the province of state and local regulation. Indeed, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. at 767 n.30; *see also Lake Country Estates*, 440 U.S. at 402; *Hess*, 513 U.S. at 44; *Dolan*, 512 U.S. at 384; *Village of Euclid*, 272 U.S. at 365; *Warth*, 422 U.S. at 508 n.18. Accordingly, unless this Court determines that Congress *expressly* authorized the Corps' intrusive, nationwide program of land-use controls, it is bound to invalidate the Corps' challenged regulations.

The statutory provision invoked by the Corps in these cases, Clean Water Act section 404(a), authorizes the Corps to "issue permits ... for the discharge of *dredged* or *fill* material into the navigable waters at specified *disposal* sites." 33 U.S.C. § 1344(a) (emphasis added). "Dredged" material refers to material that has been collected or brought up from the bottom of a river, *see* THE COMPACT OXFORD ENGLISH DICTIONARY 476 (1989), ordinarily for purposes of clearing channels for navigation. Dredged material is therefore

typically comprised of waste or refuse taken from lands lying beneath water. The reference to "dredged" waste materials, combined with the statute's reference to "disposal sites" strongly suggests that Congress was concerned about waste materials being discarded in the Nation's navigable waterways. *Cf. National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (emphasizing that the Act does not apply to the removal of material from the waters of the United States). This in turn suggests that the Clean Water Act, consistent with its overall pollution control objectives, was *not* intended to establish a regime of land-use controls. Rather the statute was primarily intended to modulate the "discharge" at "disposal sites" of "dredged" materials and similar wastes—that is, to prevent the lands submerged beneath navigable waters from becoming severely polluted dumping grounds.

Section 404(a)'s objective of controlling "disposals" of waste—as opposed to regulating improvements to private property in the manner of a zoning board—is further confirmed by the Act's section 404(c). That close neighbor to section 404(a) states that the EPA Administrator "is authorized to prohibit the specification" of "any defined area" as "a disposal site," *id.* § 1344(c)(2), so long as there appear to be good and sufficient ecological reasons for doing so. Under a plain reading of the statute, this provision is unexceptional: it means simply that the EPA may declare particularly sensitive lands off limits to waste-disposal activity. But under the Corps' interpretation, the provision is truly extraordinary: it grants EPA the authority to identify parcels that will be deemed entirely off limits to development. Under the Corps' view, EPA may refuse to specify any undeveloped wetland as "a disposal site" and thus effectively expropriate its entire economic value. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (local land-use regulation that prohibits all development and deprives parcel of all economic value

constitutes compensable Fifth Amendment Taking). Moreover, under the Corps' view, EPA can invoke this sweeping authority based on nothing more than "an unacceptable adverse effect" on things such as "wildlife" or "recreational areas." The Corps' section 404(c) reading crowns EPA's Administrator as the *uber*-arbiter of nationwide development and land-use decisionmaking.

The extreme implausibility of the Corps' statutory interpretation is further confirmed by its implications for even environmentally conscientious landowners. Consider, for example, a hypothetical landowner who cordons off a privately owned wetland; drains its water; and then fills the newly dry land with rock, sand, dirt, and gravel to prepare the ground for construction. Assuming that the drained waters were cleaned and filtered before being discharged off the property—thus preventing the discharge of any dredge or fill materials into any United States waters—there can be no claim that this hypothetical landowner has "discharged" anything but clean water itself into any "waters of the United States." There accordingly can be no claim that the landowner requires a section 404 permit under any reasonable reading of the Act. Nonetheless, the Corps' regulations would require this landowner to seek, and in many cases would require the Corps to deny, the issuance of such a permit.

It bears emphasis in this regard that Congress modeled the Clean Water Act's permitting requirements on the Rivers and Harbors Act of 1899 (also known as the "Refuse Act"). *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982) (noting that Congress "drew extensively ... upon the existing enforcement provisions of the Refuse Act of 1899"). Specifically, Congress sought to improve the pre-existing statutory scheme by filling the "significant gaps" that had rendered that Act "seriously inadequate." S. Rep. No. 92-414 (1971), reprinted in 1972, U.S.C.C.A.N. 3668, 3736; *see also id.* at 3672. Significantly, the Rivers and Harbors Act

did not grant federal authority to control standing waters on private property, but was instead limited "to water bodies that were deemed 'navigable' and therefore suitable for moving goods to or from markets." *SWANCC*, 531 U.S. at 182.

Relatedly, the Court should also bear in mind that "lands underlying" the Nation's navigable commercial waterways "have historically been considered 'sovereign lands.'" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (citation omitted); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-98 (1987). Indeed, because navigable waters "uniquely implicate sovereign interests," *Idaho v. Coeur d'Alene*, 521 U.S. at 284, and because "submerged lands are held for public purpose," *id*, the government has very limited authority to convey to private parties lands submerged beneath navigable waters. *See, e.g.*, *Utah Division*, 482 U.S. at 197-98; *Idaho v. Coeur d'Alene*, 521 U.S. at 285 (discussing *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892) (holding that the Illinois Legislature lacked authority to transfer title to submerged lands beneath navigable waters). This distinction between inherently sovereign holdings of lands submerged under navigable waters and private lands not under water helps explain the Act's focus on "disposals" into "navigable" waters. In particular, so long as section 404(a) is limited to "disposals" onto submerged, sovereign lands lying underneath navigable waters, there is no constitutional concern with displacing state land-use regulation of private property. That is, so long as the Corps' permits are required only for such disposals, its program, by definition, will steer clear of any displacement of state regulatory authority over land-use decisionmaking.

Finally, the overall pattern of federal and state land-use and pollution controls also bears mentioning. It may be significant, for instance, that the principal federal vehicles for providing land-use controls protecting aquatic ecosystems are not regulatory statutes like the Clean Water Act, but statutes authorizing the designation of areas as national parks, forests,

wilderness areas, and the like. The Secretary of the Interior is charged with developing a National Wetlands Priority Conservation Plan, which prioritizes types of wetlands for federal acquisition purposes. *Id.* § 3921(b). The Emergency Wetlands Resources Act of 1986 provides revenue-raising mechanisms for funding wetlands acquisition efforts, *see* 16 U.S.C. §§ 3901 *et seq.*, and the Water Bank Act provides certain alternative and non-traditional means by which the government may acquire protective interests in wetlands. *See* 16 U.S.C. §§ 1301-1311. Similarly, the North American Wetlands Conservation Act provides for the acquisition, management, enhancement, and restoration of wetlands for the purpose of protecting the habitats of migratory birds and other wildlife. *See* 16 U.S.C. §§ 4401-4413. The federal government accordingly manages extensive holdings of critical wetlands under aegis of the National Wildlife Refuge System and National Park Service. *See* National Wildlife Refuge System, 16 U.S.C. §§ 668dd-668ee; *see also* 16 U.S.C. § 1.

In contrast to the congressional practice of largely respecting state land-use regulation (while supplementing state efforts with federal land acquisitions), Congress has largely seized control over water-quality regulation and pollution control. Congress passed the Clean Water Act for the stated purpose of pollution control—that is, restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act concededly constitutes "an all-encompassing program of *water pollution regulation*." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (emphasis added); *see also Arkansas v. Oklahoma Envtl. Prot. Agency*, 503 U.S. 91, 111 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 485 (1987). The Clean Water Act thus establishes a "comprehensive program for controlling and abating *water pollution*," *City of Milwaukee*, 451 U.S. at 319 (emphasis added), indicating that Congress intended "to dominate the

field of *pollution regulation*." *Int'l Paper*, 479 U.S. at 492 (emphasis added).

In sum, the larger array of congressional enactments exhibits a pattern of accomplishing land-use goals without federal regulatory controls on private property, together with an undoubted willingness to regulate where bona fide pollution controls are needed. Consistent with *SWANCC*'s recognition that the Corps' authority should be interpreted to avoid unintended federal encroachments into local land-use determinations, *see SWANCC*, 531 U.S. at 173, Congress seems to have understood the critical distinction between, on one hand, the regulation of land use and, on the other hand, the prevention and reduction of water pollution. The Corps' regulations are unlawful (as well as unconstitutional) precisely because they ignore the tsunami of statutory evidence showing that Congress never intended the Clean Water Act to form an exception to this overall pattern.

B. *Riverside Bayview* Cannot Be Read To Give The Federal Government Authority To Make Land-Use Determinations For Wetlands Not "Actually Abutting" Navigable Waters.

The interpretive evidence detailed above escaped notice below largely because the Sixth Circuit became entranced with this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In this vein, the Sixth Circuit erred most egregiously by invoking *Riverside Bayview* to support giving deference to the Corps' regulations. But although *Riverside Bayview* did indeed grant the greatest conceivable deference to the Corps' administrative interpretations (and thus failed to provide any real analysis of statutory structure and text), that was because *Riverside Bayview* litigants framed only a weak takings constitutional challenge, not the serious federalism-based challenge they might have put forward. To be sure, in framing their mid-1980s case, the *Riverside Bayview* litigants

were likely misled by contemporaneous views suggesting that, after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court would demur in perpetuity from recognizing meaningful Article I limits on congressional power. *See, e.g.*, Geoffrey R. Stone, *et al.*, CONSTITUTIONAL LAW 181 (1986) (devoting a chapter to "The Purported Demise of Judicially Enforced Federalism Limits On Congressional Power"). But those views have now been definitively rejected by the Court's decisions in *Gregory*, *Lopez*, *Morrison*, and *SWANCC* itself—all of which make clear that Congress' Commerce Clause power, while broad, is *not* unlimited. *Cf. Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton* because of subsequent legal developments). The important point is that the Sixth Circuit below inexplicably failed to account for the fact that *Riverside Bayview* was litigated—however understandably—in a most unusual posture that undercuts the continuing vitality of almost all of its reasoning.

To be sure, *SWANCC* did at least assume for purposes of argument the continuing vitality of *Riverside Bayview*'s narrow holding. *SWANCC* thus assumed that "the Corps had [section] 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167. *Riverside Bayview*, as interpreted by *SWANCC*, accordingly requires as a basis for federal Clean Water Act jurisdiction a "significant nexus" between regulated land and United States waters such that the water on the regulated parcel be "inseparably bound up with 'waters' of the United States." *Id.* at 167 (internal citation omitted). This gloss on *Riverside Bayview* is best read in light of *Riverside Bayview*'s own observation that:

> the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one.

> Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.

474 U.S. at 132.

After *SWANCC*, *Riverside Bayview* stands at the very most for the view that the Constitution and Clean Water Act empower Army Corps officials to make land-use decisions for federal "enclaves" loosely defined—including not only federal territories, the District of Columbia, national forests, wilderness areas, and parks, but also, critically, wetlands within the necessarily less-than-determinate bounds of waterways deemed within some traditional view of "navigability." These lands include, at a minimum, wetlands bordering major commercial waterways like the wetlands bordering Lake St. Clair at issue in *Riverside Bayview* itself. The shores, and even paths, of the Nation's great commercial waterways—like the Mississippi River, St. Lawrence Seaway, Great Lakes, and territorial seas—are often extensively molded by Army Corps levees, dikes, locks, dams and other manmade structures. *SWANCC*'s gloss on *Riverside Bayview* recognizes this pervasive federal imprint and holds that, to the extent that *Riverside Bayview* remains valid at all, it means the following: once the Army Corps or other federal officials have assumed responsibility for managing a waterway for commercial purposes (such as navigation or flood-control), federal officials may also take the extra step of exercising ancillary land-use authority over the waterway's bordering wetlands.

Under this view of federal land-use authority, the issue of the Army Corps' regulatory jurisdiction boils down to two conceptually unproblematic (if empirically difficult) questions: (i) whether a given commercial waterway has been so pervasively subjected to federal control, or Army Corps

improvements, or commercial traffic that it may be deemed an "instrument of interstate commerce" such that the Corps may exercise an ancillary land-use authority along its banks; and (ii) whether, as a *spatial* matter, a particular wetlands parcel is within or beyond the "point at which water ends and land begins." *Id.* at 132. Hence, to the extent it has continuing validity, *Riverside Bayview* stands for the narrow proposition that wetlands "actually abutting" navigable waters constitute an exception to the rule that land-use decisionmaking is the *exclusive* province of local government. As to these wetlands, and these wetlands alone, the Army Corps' land-use regulations might arguably be lawfully applied.

III. THE CORPS EXCEEDED ITS AUTHORITY IN ASSERTING LAND-USE JURISDICTION OVER THE CARABELL AND RAPANOS WETLANDS.

The land-use focus of the Corps' regulatory program is fatal to its bid to apply that regime to the *Rapanos* and *Carabell* wetlands at issue here. For instance, June and Keith Carabell's wet parcel of land contains a "wetland" that is not in any sense "adjacent [to] open water." *Carabell v. U.S. Army Corps of Engr's*, 391 F.3d 704, 708 (6th Cir. 2004) (noting that a ditch running alongside the Carabell's land is connected to a drain, which empties into a creek, which, in turn, empties into Lake St. Clair). Moreover, like the *SWANCC* wetland, the *Carabell* wetland is hydrologically isolated: it has no hydrological connection with any water of the United States. A berm barrier (piled up more than fifty years ago) prevents any flow of water, however minor, between the Carabell's land and neighboring properties. *Id.* The *Carabell* wetland, like the *SWANCC* wetland, is therefore inundated with "nonnavigable, isolated, intrastate waters" that are "clear[ly]" outside the scope of section 404(a). *SWANCC*, 531 U.S. at 172. There is simply no bordering navigable waterway or hydrological connection

to provide the necessary "significant nexus" between the Carabell's property and a "water of the United States."

The Sixth Circuit nonetheless fixated on the fact that the *Carabell* wetland was physically close to a man-made drainage ditch, which flows into a drain, which flows into a creek, which flows into Lake St. Clair, which lies between two of the five Great Lakes. Based on this physical closeness to property forming part of the web of hydrological connections that drain water off the North American continent and out to sea, the Sixth Circuit concluded that the *Carabell* property was an "adjacent wetland" subject to Army Corps land-use restrictions. But as this Court already clarified in *SWANCC*, wetlands are subject to the Corps' jurisdiction only where they have a "significant nexus to" or are "inseparably bound up with 'waters' of the United States." *Id.* at 167. Taken together, *SWANCC* and *Riverside Bayview* make clear that such a nexus or bond may be forged in only one of two ways: through bordering a major commercial waterway, or, alternatively, through significant affects on the quantity or quality of water available for use in interstate commerce. Against this backdrop, the Sixth Circuit plainly erred. There is no claim here that the *Carabell* wetland, like the *Riverside Bayview* wetland, "actually abuts" a major commercial waterway. Likewise, there also is no claim (much less any evidence) that the development restrictions the Corps seeks to impose aim at a lawful goal such as preserving the quality of United States waters lying outside the *Carabell* parcel itself.

In *Rapanos*, the Sixth Circuit fixated, not on physical proximity, but on an intermittent, indirect, and remote surface water runoff connection to navigable waters. Yet here again, there is no allegation that the *Rapanos* parcels actually border a navigable commercial waterway. For instance, the Sixth Circuit determined that one of the *Rapanos* parcels has a hydrological surface-water connection to navigable waters because the wetlands lie next to a

manmade ditch that flows into a non-navigable stream that connects with a river that ultimately flows into the Saginaw Bay in Lake Huron. To be sure, it is undisputed that the Rapanos expanded drains, built roads, removed stumps, moved dirt, dumped sand, and attempted to fill the wetlands on their private property. But there has never been any assertion (much less any evidence) that dredged or fill material—as opposed to surface water—was ever discharged by the Rapanos into navigable waters. Hence, the *Rapanos* wetlands may be regulated, if at all, only pursuant to the Clean Water Act's grant of water-quality-preservation authority, *see* 33 U.S.C. § 1251(a), not pursuant to the Corps' land-use regulations promulgated on authority of section 404.

Given the above, it is plain that the repudiated Migratory Bird Rule is indistinguishable from the "adjacency theory" advanced by the Corps and accepted by the Sixth Circuit. As *SWANCC* emphasized, the Corps' authority to regulate discharges of dredged and fill materials into "navigable waters" does not include the authority to make land-use decisions for virtually any and every wetland. 531 U.S. at 168. As with the Migratory Bird Rule, the jurisdictional basis asserted here "assume[s] that 'the use of the word navigable in the statute ... does not have any independent significance.'" *Id.* at 172 (citation omitted). But, as *SWANCC* itself noted, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id*; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'") (citation omitted). If *any* spatial proximity (as in *Carabell*) or hydrological connection (as in *Rapanos*) suffices to provide the "significant nexus" *SWANCC* requires, then "navigable" will impermissibly cease to have independent import—much as it did under the Corps' unlawful Migratory Bird Rule. The Sixth Circuit decisions below, like the Seventh Circuit's reversible error in

SWANCC, impermissibly reads "navigable" right out of the Clean Water Act.

* * * * *

This case is "about federalism," which, along with separation of powers, is one of the two most essential structural elements of our Constitution. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Having "split the atom of sovereignty," the Framers determined that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). For these dual capacities to be meaningful, however, they must continue to correspond to a two-tiered system of well allocated governmental responsibilities. That system of allocated responsibilities traditionally and effectively assigns regulatory authority over land usage to state and local governments. These cases afford the Court a tailor-made opportunity to reaffirm and respect that assignment.

CONCLUSION

For the reasons stated, the Court should grant the writs of *certiorari*.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH GAUDIO
NFIB LEGAL FOUNDATION
1201 F Street, NW
Washington, DC 20004
(202) 554-9000

ROBERT R. GASAWAY
Counsel of Record
ASHLEY C. PARRISH
ERIN E. MORROW
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Attorneys for Amicus Curiae

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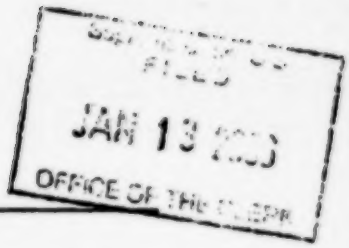

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, et al., *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

JUNE CARABELL, et al., *Petitioner*,
v.
UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL MITIGATION BANKING ASSOCIATION IN SUPPORT OF THE RESPONDENTS

Margaret N. Strand
(Counsel of Record)
John F. Cooney
Michael Munson
Venable LLP
575 7th Street, N.W
Washington, D.C. 20004
(202) 344-4000

Royal C. Gardner
1401 61st Street South
Gulfport, FL 33707
(727) 562-7864

Counsel for Amicus Curiae
National Mitigation Banking Association

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The National Mitigation Banking Association submits this Brief Amicus Curiae, with the consent of the parties, in support of the United States to demonstrate that the regulated economic activity here at issue – the discharge of dredged and fill material into intrastate waters adjacent to non-navigable tributaries of traditional navigable waters, and the attendant mitigation of those impacts – substantially affects interstate commerce in the aggregate.[1]

INTEREST OF AMICUS CURIAE

The National Mitigation Banking Association ("Association") represents commercial businesses committed to the restoration and preservation of our nation's wetlands and natural habitat through the use of mitigation and conservation banks. The Association's members have established and operated mitigation banks throughout the United States since the early 1990s.

Wetland mitigation banking is a business that offers compensatory mitigation, through sale of mitigation credits, to entities that must provide mitigation for filling of wetlands subject to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344.[2] Mitigation bankers are in the business of

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that this brief was not authored or funded by any person or entity other than Amicus or its counsel.

[2] *See, e.g.*, James Salzman & J.B. Ruhl, "No Net Loss" – Instrument Choice in Wetlands Protection," in MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: TWENTY YEARS OF EXPERIENCE (J. Freeman & C. Kolstad, eds., Oxford University Press forthcoming 2006) (discussing history of mitigation banking and the "shift in emphasis from prescriptive regulation to trading") chapter available at http://eprints.law.duke.edu/archive/00001238/ (sited last visited January 9, 2006); Leonard A. Shabman and Paul Scodari, "Past, Present and Future of Wetlands Credit Sales," Resources for the Future Discussion

restoring, enhancing and sometimes creating wetlands, in advance, to sell as compensatory mitigation when mitigation cannot be achieved at the development site.[3]

Amicus submits this brief for a limited purpose. If this Court reaches the constitutional issues presented by the cases and applies the "substantially affecting" branch of its Commerce Clause jurisprudence, the Association submits that the widespread, interstate economic enterprises involved

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Paper 04-48 (December 2004) available at http://www.rff.org/rff/Publications/Discussion_Papers.cfm (site last visited January 6, 2006); Royal C. Gardner, Rehabilitating Nature: A Comparative Review of Legal Mechanisms That Encourage Wetland Restoration Efforts, 52 Catholic Univ. L. Rev. 573 (2003); "Swapping Swampland," by Katherine Ellison, Fortune Magazine, April 15, 2002; Lisa A. Wainger, Dennis King, James Salzman & James Boyd, Wetland Value Indicators for Scoring Mitigation Trades, 20 Stan. Envtl. L.J. 413 (2001) (case study of Little Pine Island Mitigation Bank in Florida); National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* (National Academy Press, 2001) at 64-69; J.B. Ruhl & R. Juge Gregg, Integrating Ecosystem Services into Environmental Law: A Case Study of Wetlands Mitigation Banking, 20 Stan. Envtl. L.J. 365 (2001) (assessing wetland mitigation banking as "government and industry moved toward the banking program as a cornerstone of wetlands mitigation"); Royal C. Gardner, Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings, 81 Iowa L. Rev. 527, 557-63 (1996); Steve Gatewood, Disney Banks on Mitigation, 17 Nat'l Wetlands Newsl. 7 (Sept.-Oct. 1995).

[3] In 1995, the Environmental Protection Agency and the Army Corps of Engineers issued Federal Guidance on the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (November 28, 1995) (the Guidance), which provided: "The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation 'credits' which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., 'debits')."

in wetland restoration and enhancement under the Section 404 program provide constitutional authority for application of the CWA to wetlands adjacent to non-navigable tributaries. For this reason, the judgments of the lower courts should be affirmed.

SUMMARY OF ARGUMENT

In the CWA, Congress regulated the activity of discharging dredged and fill material into waters of the United States and the restoration and mitigation businesses associated with this filling. Mitigation businesses operate in interstate commerce. Congress has expressly encouraged the wetland mitigation banking industry by enacting legislation establishing a preference for mitigation banking to offset impacts of federally funded highway projects. 23 U.S.C. §§ 103(b)(6)(M) and 133(b)(11).

Application of the CWA to wetlands adjacent to non-navigable tributaries is a permissible exercise of authority under the Commerce Clause. The mitigation banking and restoration industries regulated under the Clean Water Act are interstate commercial interests. Under the "substantially affecting" standard, the aggregate effect of these industries on interstate commerce independently justifies federal regulation of wetlands adjacent to non-navigable waters.

ARGUMENT

I. WETLAND MITIGATION BANKING IS A ROBUST INTERSTATE ECONOMIC INDUSTRY REGULATED UNDER THE CWA.

Under the Section 404 program, Congress chose to regulate commercial activity, by prohibiting discharges

without a permit[4] to limit and control the pollution entering and impacting the nation's waters. The statute requires dischargers to obtain a permit for discharge of dredged and fill material into waters of the United States and to provide appropriate mitigation, 40 C.F.R. Subpart H, §§ 230.70-230.77; 33 C.F.R. § 320.4(r).[5] Congress and the regulatory agencies have recognized that mitigation banking is a preferred method of wetland mitigation, utilizing private sector economic incentives to produce environmentally sound outcomes. A network of interstate commercial activity is involved with mitigation and restoration industries.

Mitigation banking is a market-based industry which involves creation of sites of advanced, consolidated mitigation for the express purpose of compensating for the adverse impacts on wetlands authorized by a Section 404 permit. Mitigation banking is frequently used to offset the adverse impacts of roads constructed by State Departments of Transportation, as well as land development activities nationwide.

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[4] Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344(a).

[5] *See*, 60 Fed. Reg. at 58,606 ("Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands.") *See also*, Royal C. Gardner, Mitigation, in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404 (Kim Diana Connolly, Stephen M. Johnson & Douglas R. Williams, eds., American Bar Association 2005) (noting that mitigation is "a central premise of Federal wetland regulatory programs") (quoting White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach (Aug. 24, 1993)).

A mitigation bank typically utilizes a medium to large degraded wetland site, and improves the ecological characteristics of the site through restoration and enhancement efforts, or through wetlands creation. Grading, hydrological adjustments, removal of vegetation and planting of new vegetation are typical activities involved in wetland mitigation. The units of restored, enhanced or created wetlands are expressed as "credits," which mitigation bankers sell to developers or other Section 404 permittees to offset the "debits" that will result from permitted filling at the project development site.

Congress has expressly recognized the role of mitigation businesses in the CWA. In 2004, Congress directed the Secretary of the Army to establish regulations for mitigation and mitigation banking under Section 404.[6] Starting in 1991, Congress identified mitigation banking as the preferred method of compensatory mitigation for wetland impacts from federally funded and interstate highway projects, first by authorizing use of federal funds to purchase mitigation bank credits and then, in 1998, by directing that mitigation banks be considered in the first instance to compensate for wetland impacts from federally funded and interstate highway projects.[7]

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[6] 33 U.S.C. § 1344, note (b), codifying the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 314(b), 117 Stat. 1431 (2003).

[7] 23 U.S.C. §§ 103(b)(6)(M) and 133(b)(11). *See*, Surface Transportation Program, Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1106(b), *amending* 23 U.S.C. § 103(b)(6)(M); Pub. L. No. 105-178, § 1108(a)(6), *amending* 23 U.S.C. § 133(b)(11). In 1991, Congress had expressly authorized federal highway funds to be utilized for wetland mitigation banking. *See*, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1006, *amending* 23 U.S.C. § 103(i)(13) (1991) (currently 23 U.S.C. § 103(b)(6)(M)); Pub. L. No. 102-240, § 1007, *amending* 23 U.S.C. § 133(b)(11).

Congressional codification of the role of mitigation banking was built upon a long process of regulatory, scientific and policy acknowledgment of the benefits of commercial mitigation banking. Since the seminal report, *Protecting America's Wetlands: An Action Agenda*, The Final Report of the National Wetlands Policy Forum (The Conservation Foundation, 1988), mitigation banking has been recognized as most appropriate for CWA compensatory mitigation. Indeed, after a comprehensive two-year study, the National Academy of Sciences recently affirmed that mitigation banking offers advantages over traditional mitigation approaches. National Research Council, *Compensating For Wetland Losses Under the Clean Water Act* (National Academy Press 2001) at 160-164.[8]

Federal regulatory agencies have long recognized the importance of mitigation banking in carrying out the purposes of the Section 404 program. As early as 1983, the U.S. Fish and Wildlife Service adopted a policy directive to guide use of mitigation banking, most of which was advanced consolidated mitigation for transportation activities.[9] In 1993 and 1995, the Corps of Engineers and the Environmental Protection Agency concluded that mitigation banking offered substantial advantages,[10] and established

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[8] *See also*, Society of Wetland Scientists, Wetland Mitigation Banking, Position Paper, February 2004, available at http://www.sws.org/wetlandconcerns/banking.html (site last visited January 9, 2006).

[9] U.S. Fish and Wildlife Service, Interim Guidance on Mitigation Banking, ES Instruction Memorandum No. 80 (June 23, 1983).

[10] *See*, Army Corps of Engineers and Environmental Protection Agency *Regulatory Guidance Letter No. 93-2*. "Memorandum to the Field. Subject: Establishment and Use of Wetland Mitigation Banks in

the Clean Water Act Section 404 Regulatory Program," 60 Fed. Reg. 13,711 (Aug. 23, 1993). *See also* The Joint Corps of Engineers and EPA Guidance, 60 Fed. Reg. at 58,607, providing:

Mitigation banks provide greater flexibility to applicants needing to comply with mitigation requirements and can have several advantages over individual mitigation projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically appropriate;

2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function;

3. Use of mitigation banks may reduce permit processing times and provide more cost-effective compensatory mitigation opportunities for projects that qualify;

4. Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;

5. Consolidation of compensatory mitigation within a mitigation bank increases the efficiency of limited agency resources in the review and compliance monitoring of mitigation projects, and thus improves the reliability of efforts to restore, create or enhance wetlands for mitigation purposes;

6. The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing opportunities to compensate for

procedures for the approval and management of mitigation banking. After Congress enacted the 1998 preference for mitigation banks to compensate for impacts from highway projects, the Federal Highway Administration promulgated regulations to govern mitigation banking for interstate and national highway projects.[11] Congress has maintained a consistent oversight of the wetland mitigation industry, investigating and seeking periodic reports from the Congressional Research Service and Government Accounting Office on the progress of compensatory mitigation projects.[12]

Since the early 1990s, mitigation banks have proliferated across the country. The construction of mitigation banks and the offering and sale of credits from those banks are quintessentially interstate commercial activities. The Environmental Protection Agency estimates that mitigation banking has grown from 46 banks in 1992, to 219 banks by the end of 2001, to an estimated more than 450 in 2005.[13] According to Corps of Engineers data, as of 2000,

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authorized impacts when mitigation might not otherwise be appropriate or practicable.

[11] 23 C.F.R. § 777.9. *See also,* Mitigation of Impacts to Wetlands and Natural Habitat, 65 Fed. Reg. 82,913 (Dec. 29, 2000).

[12] *See, e.g.*, Jeffrey Zinn, *Wetland Mitigation Banking: Status and Prospects*, Congressional Research Service, CRS 97-849 (1997); U.S. General Accounting Office, *Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu Fee Mitigation*, GAO-01-325 (May 4, 2001); Jeffrey A. Zinn and Claudia Copeland, *Wetland Issues*, Congressional Research Service, CRS IB97014 (updated June 2, 2005).

[13] Environmental Protection Agency, Mitigation Banking Fact Sheet, available at http://www.epa.gov/owow/wetlands/facts/fact16.html (site last visited January 5, 2006).

there were between 370 and 400 mitigation banks nationwide, in more than 35 states.[14]

Companies in this industry often have mitigation banks or other operations in multiple states.[15] The industries providing other services for compensatory mitigation, such as vegetation and materials for restoration, also are interstate enterprises.[16] While most mitigation banks are located

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[14] *See*, "Existing Wetland Mitigation Bank Inventory", Institute for Water Resources (IWR), U.S. Army Corps of Engineers (Spring 2000), available at: http://www.iwr.usace.army.mil/iwr/regulatory/regulintro.htm#mitbanking (site last visited January 4, 2006). *See also, Banks and Fees: The Status of Off-Site Wetland Mitigation In the United States*, Environmental Law Institute, 2002; *Wetland Mitigation Banking*, Environmental Law Institute, 1993.

[15] For example, EarthMark Companies is an environmental development company based in Florida and is active in mitigation in multiple states in the eastern United States through its affiliate companies in North Carolina (Mid-Atlantic Mitigation, LLC) and West Virginia (EarthMarkWVMitigation, LLC). Current projects are located in Florida, North Carolina, West Virginia and New Jersey. http://www.mitigationbank.com/mitigationbanks.htm (site last visited January 10, 2006) and http://www.earthmark.us/ (site last visited January 10, 2006). Wildlands, Inc., based in California, has mitigation banks and projects in California, Washington and Alaska. http://www.wildlandsinc.com/projectmap.htm (site last visited January 6, 2006). Creative Environmental Solutions, an engineering and environmental science company based in Florida, identifies banks in two states (Florida and Georgia) http://www.creativeenvironmental.com/wetland.asp (site last visited Dec. 21, 2005). Land and Water Resources, Inc., based in Rosemont, Illinois operates banks in Illinois, Colorado and Mississippi. http://www.lawrinc.com/banks.html (site last visited January 10, 2006).

[16] *E.g.*, Huffman & Carpenter, based in Reno, Nevada, provides wetland mitigation (and delineation services) projects in Nevada, California and other states, http://www.nvwetlands.com/comprehensive.html (site last visited December 21, 2005). Envirotech Consultants, a provider of

within and offer credits within one state, some mitigation banks are authorized to operate in multiple states.[17] Indeed, the Environmental Protection Agency has recognized that "entrepreneurial providers of bank credits have emerged as a nationally-organized industry contributing hundreds of millions of dollars annually to the domestic product."[18] With respect to wetland restoration in general, the Fish and Wildlife Service estimated that more than $139 million would be spent in 25 states and one territory by the end of

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wetland nursery services, is involved in projects in Ohio and other states, http://www.envirotechcon.com/services1.html (site last visited Dec. 21, 2005). Applied Ecological Services is a company is based in Wisconsin, with offices in Illinois, Minnesota and Kansas, which provides plant and nursery services to wetland restoration projects in Illinois, Missouri, Kansas and other states. http://www.appliedeco.com/Wetland.cfm (site last visited January 9, 2006). JFNew is an ecological services company providing native plants, wetland restoration and mitigation banking services in multiple states primarily in the Midwest, http://www.jfnew.com/habitat-restore-root.asp (site last visited January 9, 2006). Habitats Native Plant Nursery provides wetland plants in Kentucky and Ohio, http://www.habitatsnursery.org (site last visited January 9, 2006). The Society of Wetlands Scientists maintains a listing of vendors in wetlands services, reflecting a small portion of the national and interstate businesses in wetland restoration and mitigation services, available at http://www.wetlandcert.org/vendor-display.html?rid=90 (site last visited January 9, 2006).

[17] *See, e.g.*, "Existing Wetland Mitigation Bank Inventory," Institute for Water Resources (IWR), U.S. Army Corps of Engineers (Spring 2000), which identifies two banks authorized to operate in both Louisiana and Mississippi, the Delta Land Trust Umbrella Mitigation Bank Agreement and the TL James (umbrella) bank.

[18] EPA, Mitigation Banking Fact Sheet at 3 (Nov. 25, 2005), available at http://www.epa.gov/owow/wetlands/facts/fact16.html. (site last visited January 9, 2006).

Fiscal Year 2004 to restore or protect more than 167,000 acres of wetlands. [19]

In sum, wetland mitigation in general and wetland mitigation banking in particular are interstate commercial activities regulated and encouraged under the CWA, other federal statutes and regulations of multiple federal agencies.

II. APPLICATION OF THE CLEAN WATER ACT TO WETLANDS ADJACENT TO NON-NAVIGABLE WATERS FALLS WITHIN CONGRESSIONAL AUTHORITY TO REGULATE INTERSTATE COMMERCE THROUGH ITS EFFECT ON MITIGATION INDUSTRIES.

For purposes of the arguments presented in this brief, Amicus assumes the following facts, as found by the Court of Appeals: In *Rapanos*, the wetlands were adjacent to non-navigable waters that had some hydrological connection to navigable waters. *United States v. Rapanos*, 376 F.3d 629, 632-33 (6th Cir. 2004). In *Carabell*, the wetlands were separated from non-navigable waters by a man-made berm, allowing no regular hydrological connection. *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 705-06 (6th Cir. 2004). For purposes of this brief, both circumstances are referred to as wetlands adjacent to non-navigable waters.

As this Court has reiterated, Congress has authority under the Commerce Clause to regulate in three broad categories: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities

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[19] Jeffrey A. Zinn and Claudia Copeland, *Wetland Issues*, CRS IB97014 (updated June 2, 2005) at 12.

substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 617 (2000). If the Court reaches the third, "substantially affecting" branch of the analysis, Amicus submits that regulation of wetlands adjacent to non-navigable waters meets this standard because it impacts a significant form of interstate economic activity based on these wetlands – mitigation banking.

Under *Lopez* and *Morrison*, the Court evaluates four considerations in determining whether conduct "substantially affects" interstate commerce: (1) Is the regulated activity commercial or economic in nature, (2) Is there a jurisdictional element in the statute, (3) Do Congressional findings or legislative history link the regulated activity to interstate commerce, and (4) How attenuated is the link between the regulated activity and interstate commerce.[20] This brief addresses the first and fourth factors.

Amicus submits that the economic activity in these cases, the dredging and filling of wetlands adjacent to non-navigable waters for commercial purposes, substantially affects the interstate commercial activity in the mitigation banking and restoration industries.

A. The Regulated Activity Is Commercial and Economic.

The activity regulated under the CWA is the discharge of fill material into wetlands adjacent to non-navigable waters. A person wishing to undertake such

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[20] The second factor has been described as neither necessary nor sufficient to establish constitutionality. *Morrison*, 529 U.S. at 613. Amicus defers to the briefs of others who will address the CWA legislative history that may be pertinent to the third factor.

activity must first apply for and obtain a permit, which triggers an integrated system of compensatory mitigation for authorized discharges. Congress expressly recognized that discharges under Section 404 involve the commercial activities of mitigation, as reflected in its enactment of a statute that requires the Army Corps of Engineers to promulgate regulations concerning mitigation and mitigation banks (see note 7, above).

The literal language of the statute demonstrates that Congress understood that destruction of wetlands through filling involves commercial activities that may substantially affect interstate commerce. In fact, in Section 404(f), Congress created specific exemptions from the permit requirement for five types of economic activity. 33 U.S.C. § 1344(f)(1)(A)-(E) illustrate the kinds of activities Congress knew were regulated by the CWA. Discharges of dredged or fill material associated with farming, mining, forestry and associated road building – all interstate commercial activities – are exempted from the permit requirement.[21] The statute does not exempt the kinds of discharges of dredged and fill material involved here, which literally would support commercial activity involving a condominium complex and a shopping center.

To find that wetlands adjacent to non-navigable waters are included in the jurisdictional reach of the statute, this Court need find only that Congress could rationally have concluded that the intrastate discharge of dredged or fill material and its compensatory mitigation, taken in the

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[21] Amicus cites Section 404(f) to illustrate Congressional intent to regulate commercial activity, not as illustrative, itself, of the geographic scope of the CWA. *See, Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159, 171, n. 7 (2001).

aggregate, have a substantial effect on interstate commerce.[22] "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial effect on interstate commerce." *Gonzales v. Raich*, 125 S. Ct. 2195, 2205-06 (2005) (*quoting Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). The "substantially affecting" standard often involves aggregation of individual actions that, alone, would not affect interstate commerce. *Lopez*, 514 U.S. at 558-561. The regulated activity here at issue – the dredging and fill of intrastate wetlands and its attendant mitigation – affects interstate commerce in the aggregate.

As this Court stated in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985), "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as waters." In *Raich*, this Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Raich*, 125 S. Ct. at 2209. The same is true for the regulation of intrastate wetlands under the CWA.

In certain respects, the Congressional actions regarding mitigation banking reflect a mirror image of the statute at issue in *Raich*. In the CSA, Congress sought to

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[22] "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 125 S. Ct. at 2208-09; *see also, Lopez*, 514 U.S. at 557.

extinguish a market; in the CWA and transportation laws, Congress seeks to encourage a market in wetland mitigation banking. In both cases, however, Congress clearly has authority to do so under the Commerce Clause. To conclude that there is no federal jurisdiction over wetlands adjacent to non-navigable waters would have a devastating impact on the mitigation industry and would frustrate Congress's intent to promote this market-based approach to environmental protection. For example, after the *SWANCC* decision, mitigation banks in the Chicago District of the Corps of Engineers lost approximately half of their sales volume and gross income.[23]

B. There is a Direct Link between the Regulated Activities and Interstate Commerce.

The fourth factor in the *Lopez / Morrison* analysis considers the degree of attenuation between the regulated activity and interstate commerce. The Constitution does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

The relationship between the discharge of dredged or fill material into intrastate wetlands adjacent to non-navigable waters, compensatory mitigation, and interstate commerce is direct. A robust national market exists in wetlands mitigation banking that would be undermined if the provision at issue here were struck down. Development of the national mitigation banking industry has been encouraged and steered by Congress, through its express preference for use of this market-based mechanism as

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[23] *See*, Royal C. Gardner & Theresa J. Pulley Radwan, What Happens When a Wetland Mitigation Bank Goes Bankrupt?, 35 Envtl. L. Rep. 10590, 10591 n.10 (2005).

compensatory mitigation for highway projects and other authorized CWA discharges. As discussed above, there is robust interstate economic activity in wetland mitigation and mitigation banking.

Several courts of appeals have recognized that the restoration and mitigation industries associated with environmental regulation form an appropriate linkage to interstate commerce. *See United States v. Ho*, 311 F.3d 589, 604 (5th Cir. 2002) ("illicit asbestos removal project likely would reduce the number of companies providing asbestos removal services," and would give Ho a "commercial advantage over conscientious property owners who must pay higher prices for asbestos removal."). *See also*, *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) ("to the extent a chemical plant can dispose of its waste on-site free of regulation, it would have a market advantage over chemical companies that lack on-site disposal options; Olin's actions, therefore, have an economic character.")

The analysis and conclusions relying upon restoration industries as a basis for federal regulation are similar to determinations that interstate tourism provides a sufficient nexus to wildlife and species protection. *See*, *Gibbs v. Babbitt*, 214 F.3d 483, 492-93 (4th Cir. 2000) ("[t]he relationship between red wolf takings and interstate commerce is quite direct – with no red wolves, there will be no red wolf related tourism . ..."). *See also*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) ("Commerce among the states, we have said, consists of intercourse and traffic between their citizens ... ") (*quoting Hoke v. United States*, 227 U.S. 308, 320 (1913)).

CONCLUSION

Amicus submits that if the Court evaluates the constitutional issues presented in these cases under the "substantially affecting" standard, it should uphold CWA jurisdiction over wetlands adjacent to non-navigable waters based on the substantial effects on the interstate commerce in wetland mitigation banking and restoration.

Respectfully submitted,

Margaret N. Strand
(Counsel of Record)
John F. Cooney
Michael Munson
Venable LLP
575 7th Street N.W.
Washington, D.C. 20004
(202) 344-4000

Royal C. Gardner
1401 61st Street South
Gulfport, Florida 33703
(727) 562- 7864

Counsel for Amicus Curiae
National Mitigation Banking
Association

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

JUNE CARABELL, ET AL.

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF AMICI CURIAE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, THE AMERICAN ROAD AND TRANSPORTATION BUILDERS, THE CITY OF VICTORVILLE, CALIFORNIA, AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

LAWRENCE R. LIEBESMAN *
RAFE PETERSEN
ETHAN ARENSON
STUART TURNER
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-3000

**Counsel of Record*

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33 U.S.C. § 1344(a) (2000) 16

33 U.S.C. § 1362(2) (2000) 16

33 U.S.C. § 1362(7) (2000) 16

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The National Stone, Sand and Gravel Association, the American Road and Transportation Builders Association, the City of Victorville, California, and the Nationwide Public Projects Coalition, as *amici curiae*, respectfully submit this brief in support of Petitioners John A. Rapanos, et al. and June Carabell, et al.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies and associations, and local governments that provide essential services to the public including flood control and water supply management, construction of vital public infrastructure projects and the production of aggregates that are utilized in construction projects across the county.

On a daily basis, *Amici* are forced to navigate the confusing and ever-changing maze of regulations and policy statements issued by the Army Corps of Engineers in order to determine the answer to what should be a simple question: does a given wetland fall under federal jurisdiction pursuant to the Clean Water Act ("CWA")? Under the current framework, determining the answer to this simple inquiry is exceedingly difficult and, even more troubling for *Amici*, often varies depending on in which part of the Country the wetland is located or which particular agency staff member is consulted. *Amici* firmly believe that the time has come for this Court to provide clear criteria for CWA jurisdiction that

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[1] All parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

recognizes the proper limits of federal jurisdiction over non-navigable waters, and eliminates the inconsistency and lack of clarity that has been the hallmark of this area of the law for far too long.

The *Amici* consist of the following:

The National Stone, Sand and Gravel Association ("NSSGA") is a trade association that represents more than 895 members and approximately 120,000 working men and women in the aggregates and related industries. During 2004 alone, a total of more than 2.86 billion metric tons of aggregate materials (crushed stone, sand, and gravel), valued at more than $16 billion, were produced and sold in the United States. NSSGA's members are responsible for over 90 percent of the annual production of crushed stone and over 70 percent of the annual production of sand and gravel in the United States. Due to how aggregates are formed, sand and gravel are often located near or under streams and other wetlands. Consequently, NSSGA's members frequently excavate materials from these areas. The vast majority of these materials are utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement.

The American Road and Transportation Builders Association ("ARTBA"), is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers. These member companies employ more than 2.5 million people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure

projects such as highways, bridges, airports, railroads, and mass transit facilities.

The City of Victorville, California has a population of approximately 78,000 and is located approximately 97 miles Northeast of Los Angeles and 35 miles Northeast of San Bernardino at the edge of the Mojave Desert. The Southern California Logistics Airport ("SCLA"), formerly the George Air Force Base, is located in the City and has become the primary focus of the City's development plans. The City is located within the Mojave River Watershed in the high desert region of Southern California. The Mojave River, the primary source of surface water for the basin, is normally dry, except for a small stretch of perennial flow and periods of flow after intense storms. The Mojave River actually flows underground for much of its 120 miles. The City is very concerned that, if the Court upholds the Sixth Circuit's decisions below, normally dry desert washes found in the Mojave River basin that are wet only after intense storms would be considered "Waters of the United States." Such expanded jurisdiction could have a severe impact on the expansion of the SCLA and other development projects, including manufacturing and industrial production, as well as public infrastructure projects that are vital to the City's economic growth and integral to the City's long-term growth plans.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC works on behalf of members of the public to ensure that vital public infrastructure services

are provided in a safe, timely and environmentally-beneficial fashion. Consisting of public agencies and firms that provide vital infrastructure and services, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of human lives and property. NPPC's members are typified by the following agencies:

The West Valley Water District of Rialto, California ("WVWD") is an independent special district that serves water customers living in southwestern San Bernardino County and northern Riverside County. WVWD depends on local surface water resources, five groundwater basins and the California State Water Project to meet the needs of more than 50,000 persons.

The Metropolitan Denver Water Authority of Littleton, Colorado ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

The Semitropic Water Storage District of Wasco, California ("SWSD") supplies agricultural water for more than 140,000 irrigated acres of growing crops such as alfalfa, cotton, nuts, vegetables, grains and grapes. SWSD operates one of the largest groundwater storage projects in the world, and help meet the drought-year needs of more than 20 million California residents.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia. CCMWA is a regional water wholesaler that supplies water to municipalities and counties serving more than 780,000 people in the rapidly growing Metro-Atlanta area. Included are all of Cobb County and its municipalities, all of Paulding County, and portions of Douglas County, Cherokee County and Fulton County.

The Wheeler Ridge-Maricopa Water Storage District of California ("WRMWSD") is a political subdivision of the state of California whose jurisdiction encompasses approximately 147,000 acres of land in Kern County, at the extreme southern end of the San Joaquin Valley and south of Bakersfield. Most of the District's water supply is obtained via the California Aqueduct from the State Water Project. More than 20 different crops are grown within the District.

SUMMARY OF ARGUMENT

1) The expansive jurisdictional approach urged by the Government and adopted by the Sixth Circuit below runs counter to this Court's clear guidance in Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001) that the CWA requires a showing of a "significant nexus" to navigable waters in order to assert jurisdiction. The lack of clear guidance and the inconsistent interpretation by various Army Corps of Engineers districts have created substantial confusion and uncertainty for the public works community making it difficult to deliver materials and to construct essential public works projects, such as flood control, in a timely fashion.

2) Contrary to the Sixth Circuit's ruling endorsing the "migratory molecule" test, "significant nexus" must constitute more that a mere tenuous hydrologic connection. *Amici* submit there must be credible evidence of: (a) a direct, discrete and defined surface hydrologic connection to a navigable water; and (2) a demonstration that a discharge into such a connected water has a substantial injurious impact on the water quality of the navigable water, applying the principles of proximate causation and forseeability set forth by this Court in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

3) The Sixth Circuit's broad interpretation of CWA jurisdiction violates the fundamental principle of federalism that, absent a "clear statement" from Congress, a reviewing court should not sanction usurpation of State and local control of land and water resources. Affirming the Sixth Circuit's decisions would upset the delicate balance between regulation under the CWA and regulation under water pollution programs at the State and local level, which typically are far broader than their federal counterparts.

ARGUMENT

I. THE EXPANSIVE JURISDICTIONAL APPROACH URGED BY THE GOVERNMENT AND ALREADY ADOPTED IN SOME AREAS OF THE COUNTRY BY THE ARMY CORPS OF ENGINEERS HAS RESULTED IN INCONSISTENCY AND CONFUSION AND HAS DONE SIGNIFICANT HARM TO THE PUBLIC PROJECTS COMMUNITY.

A. The Lack Of Clear And Consistent Guidance Over The Scope Of CWA Geographic Jurisdiction Has Created Confusion In The Regulated Community

Despite this Court's guidance in Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"), the U.S. Army Corps of Engineers ("Corps") has continued to assert CWA jurisdiction over wet areas that have the most remote, if any, hydrologic connection to navigable waters. The Corps's expansive and often inconsistent interpretation of the CWA has been enabled by a lack of clear guidance from the lower federal courts, which have disagreed over the correct interpretation of SWANCC. Complicating matters further, several regional offices of the United States Environmental Protection Agency[2] ("EPA") and divisions of the Corps straddle two or more Circuits that have arrived at opposing conclusions regarding CWA jurisdiction in the wake of SWANCC. As a result, it is often incumbent upon individual regulators to make sense of competing legal standards depending upon where a particular project or parcel happens to lie.

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[2] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. See 43 Op. Att'y Gen. 15 (1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. See Margaret N. Strand, Wetlands Deskbook, (2d ed. 1997) (Mem. of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)).

In the confusion that has followed SWANCC, *Amici* have found it difficult to predict when the Corps will assert jurisdiction over isolated and ephemerally wet areas and thereby force *Amici* into the time-consuming and expensive permitting process. The reigning confusion over the proper jurisdictional reach of the CWA in the wake of SWANCC has had a chilling effect on public projects by allowing the Corps and the EPA to interfere with carefully considered decisions and investments of state and local governments that are intended to meet vital public needs, including life saving infrastructure.

For example, sand and gravel pits, settling ponds related to sand and gravel operations, and ditches along rail lines made from borrowing material to build the railway berm have been claimed by the Corps as jurisdictional. In other circumstances, the mere presence of a 100-year flood plain has led to speculation about a potential hydrological connection that is adjudged sufficient to declare a wetland as jurisdictional. In other cases, wetlands have been claimed by the Corp as "adjacent" due to the presence of man-made conveyances. No mention of a determinable distance between a wetland and navigable water has ever been dictated to assert the difference between "adjacent" and "isolated" wetlands. As a result, many aggregate mining operations and road construction companies must participate in the lengthy and complex Section 404 permitting process.

Moreover, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. Depending on whether such areas are within federal jurisdiction, these agencies may be required to obtain permits from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the

maximum capacity and proper functioning of the flood control systems during major flood events.

The current state of confusion amongst the regulated community has been well documented in a February 2004 report issued by the United States General Accounting Office ("GAO") that reviewed the problems in the Corps's jurisdictional determination process in the wake of this Court's decision in SWANCC. Among other findings, the GAO noted that the Corps has been utilizing "vague" language to make jurisdiction determinations and has been forced to rely "on the key terms in the regulatory definitions of waters of the United Sates which [have] not been well defined." United States General Accounting Office, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297 at 26. The result, the GAO found, has been "confusion in the districts" and "differences in jurisdictional determination practices among Corps districts. . . . " Id.

The concerns voiced in the GAO's report have been confirmed and amplified in a survey conducted by NSSGA of its members seeking information about the state of the CWA jurisdictional regulations as they are being applied in the wake of SWANCC. The survey asked respondents to describe the jurisdictional tests that Corps personnel were using to evaluate wetlands, including separate questions regarding the use by field personnel of groundwater, man-made conveyances and the 100-year floodplain to establish jurisdiction. The results of the survey reveal a gross inconsistency of implementation that is at best unpredictable and at worst, indecipherable.

The following are a few examples of survey responses demonstrating the inconsistent approaches currently being used by Corps field personnel:

- "The Corps has required fill permits for wetlands adjacent to streams (a stream is anything that is a blue line on a topo[graphical] map)." (CA)

- "[The Corps] chose to assert jurisdiction because of a man-made ditch that drained the isolated wetland. The ditch was dry but the Corps claimed a groundwater connection." (NY)

- "In one permit where there was a hydrologic connection with the wetland via a large drainage ditch, they still claimed no permit required. " (FL)

- "[T]he Corps will make an assessment . . . to determine if a specific intermittent stream has a surface flow all the way to the tributary or interstate water at least every other year." (CO)

- "At present, the mere presence of a 100-year flood plain and the absence of two barriers to prevent wetland waters from reaching the navigable waters are sufficient criteria to name the wetland as jurisdictional." (SC)

- "The Charleston District uses a combination of distance from the navigable waters to the isolated wetlands and any connection such as a ditch to assert jurisdiction." (SC)

- "No distinction is made by the Corps between natural and man-made conveyances in their assertion of jurisdiction . . . There is no distance threshold between an "isolated" wetland and a navigable water." (CO)

- "Every swale and abandoned agricultural drainage ditch was subjected to jurisdiction." (VA)

- Sand and gravel pits, settling ponds related to sand and gravel operations, and ditches along rail lines made from borrowing material to build the railway berm have been asserted by the Corps as jurisdictional. (TX)

- The presence of a 100-year floodplain has been used to assert jurisdiction on tributaries and isolated wetlands. Ephemeral and intermittent waterways are considered jurisdictional by the Corps if they can be tied to a navigable waterway and exhibit an ordinary high water mark ("OHWM") (TX).

The responses to the NSSGA survey leave the reader with nothing but a tangible sense of confusion. A blue line on a topographical map is jurisdictional; perhaps an OHWM is required, or a groundwater connection, or a flow which occurs every other year. A ditch may draw a jurisdictional connection, or it may not. Nothing is covered. Everything is covered. This is an unsustainable regulatory environment under which to responsibly run a business.

It is vitally important that this Court reaffirm the limited jurisdiction of the federal government under the CWA and provide the Corps with clear jurisdictional criteria. Such a ruling will go a long way toward providing *Amici's* diverse membership with the certainty and predictability that has long been lacking in wetlands permitting, and will ensure that *Amici* can continue to provide their vitally important services to the public at large.

B. Adoption Of The Mere Hydrological Connection Or The "Migratory Molecule" Standards Urged By The Government And Adopted By The Sixth Circuit In Rapanos And Carabell Would Have Severe Consequences For The Public Works Community

While the *Amici* desperately need a certain and consistent approach to the assertion of federal jurisdiction under the CWA, it is equally important to the *Amici* that the approach adopted by this Court is rooted in the CWA and recognizes the limitations of federal jurisdiction over wetlands and waters that are far removed from traditionally navigable waterways.

Under the "migratory molecule" test espoused by the Government and adopted by the Sixth Circuit in Rapanos and Carabell, every isolated wetland with even the most tenuous and fleeting of connections to a navigable water will be subject to federal jurisdiction under the CWA if one molecule of water from the wetland eventually reaches, or could potentially reach, a navigable water. Such a test would have a severe impact upon the *Amici*, as virtually every project that occurs in wet terrain would be swept into the CWA, with the resulting costs and delays of the Section 404 permitting process. Such expansion of the 404 permitting process is not only burdensome, but contrary to the intent of CWA.

Whether or not a 404 permit is required has a huge impact on the expense and timeframe of public projects, as *Amici* often face great costs and significant delays under the 404 program. A 1999 survey indicates that it takes an average of 788 days to process an individual permit under Section 404 at an average cost in excess of $270,000 per

application.[3]

This delay and expense is particularly troublesome in the wake of the unprecedented damage wrought by the 2005 hurricane season. As a result of storms like Hurricane Katrina, the demand for new public infrastructure is immense. In Louisiana alone, more than $32.6 billion has been requested to rebuild the state's transportation infrastructure and hurricane defenses. See Testimony provided to Committee of Transportation and Infrastructure: Before Subcomm. on Highways, Transit, and Pipelines, 109th Cong. (2005) (statement of Johnny B. Bradberry, Secretary of Louisiana Department of Transportation and Development) at 2 (available online at http://www.house.gov/transportation/highway/10-27-05/bradberry.pdf) Clear criteria defining "substantial nexus" will help ensure that these critical projects are not impeded by the confusion and uncertainty that currently exists as to what is and what is not a regulated water of the United States under the CWA.

In addition to the broad national implications of this overreach, the process of aggregate mining itself demonstrates the "real world" consequences of the Sixth Circuit's ruling. For example, NSSGA member Martin Marietta Aggregates constructed a dam which created a pond at its Appling Quarry, in Columbia County, Georgia for sedimentation control, water supply and final treatment of process water — necessary aspects of such mining. Discharges from the pond into a nearby creek were permitted under a CWA Section 402 NPDES permit issued by the State

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[3] See David L. Sunding and David Zilberman, The Economics of Environmental Regulation by Licensing, An Assessment of Recent Changes to the Wetlands Permitting Process, Natural Resources Journal, Winter 2002, at pp. 9-10

of Georgia and the Corps determined that the pond was not subject to the jurisdiction of the Corps under section 404 of the CWA. Despite the fact that the non-jurisdictional pond cut off any surface flow from wetlands and waters upstream of the pond to the downstream creek and that any discharges from the pond itself complied with the NPDES permit and would not violate water quality standards in the creek, the Corps still asserted jurisdiction over those wetlands and waters. The Corps based its decision on the theory that the construction of the pond did not cut off any pre-existing continuous surface water connection between the upstream wetlands and waters and other downstream jurisdictional waters that eventually flowed into the navigable waters. Martin Marietta filed an administrative appeal contesting the Corps jurisdiction. The case was eventually remanded by a federal court to the Corps and the issue remains unresolved two years after the administrative appeal was filed.[4] This is but one example of the kind of overreach that the Sixth Circuit's ruling would sanction should that decision be upheld by the Court.

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[4] See Martin Marietta Materials Inc. v. U.S. Army Corps of Engineers, CV 104-146 (S.D. Ga., April 13, 2005).

II. THE REQUISITE "SIGNIFICANT NEXUS" BETWEEN A NON-NAVIGABLE WETLAND AND A NAVIGABLE-IN-FACT WATER CAN ONLY BE ESTABLISHED BY PROOF OF A SIGNIFICANT HYDROLOGICAL CONNECTION AND EVIDENCE THAT POLLUTANTS DISCHARGED INTO THE WETLAND WOULD BE HARMFUL TO THE CHEMICAL, PHYSICAL, OR BIOLOGICAL INTEGRITY OF THE NAVIGABLE WATER

Prior decisions of this Court make clear that unless a wetland or water is directly adjacent to a navigable water, there must be a "significant nexus" between the isolated wetland and a water that is navigable-in-fact. The lower courts (and the Corps for that matter), however, have struggled to determine what constitutes the necessary "significant nexus." This difficulty has had a profound effect on *Amici* and the public they serve through inconsistent and confusing jurisdictional determinations.

This Court's opinion in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), cannot justify the overbroad assertion of jurisdiction by the Sixth Circuit and other lower courts. There, the Court found CWA jurisdiction only over non-navigable adjacent wetlands that actually abutted a navigable waterway. The Court reasoned that the fact that such wetlands were "inseparably bound up" with the navigable water provided an adequate "legal judgment" that they too were jurisdictional. 474 U.S. at 134. This judgment was based on evidence that the adjacent wetlands have significant effects on water quality and the aquatic ecosystem of the adjacent waterways. Id. at 135. The Court, however, specifically did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." Id. at 131-132, n.8.

Nor is SWANCC just a very narrow ruling on the "migratory bird" test. Rather, in excluding a particular non-adjacent, isolated pond from CWA jurisdiction, the Court stressed the importance of establishing a nexus to traditionally navigable waters (defined in relevant part as "those waters that are subject to the ebb and flow of the tide, or have been use in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4). That is, the "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made." Id. at 172. The Court clarified that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." SWANCC, 531 U.S. at 167. Thus, the true question before this Court is how to define the parameters of the requisite "significant nexus."

Amici submit that this "significant nexus" must constitute more than a mere hydrological connection. In order to be true to the statute, the significant nexus ought to meet two factors. There must be credible evidence of: (1) a direct, discrete and defined surface hydrological connection to a navigable water (based on Congress's limited power over navigation, 33 U.S.C. §§ 1344(a), 1362(7)); and (2) a demonstration that a discharge into that "connected" water has a substantial injurious impact on the water quality of navigable water (based on the CWA's stated purpose of protection of the chemical, physical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251(a) (2000)).

In their struggle to define what constitutes a "significant nexus" many courts have settled for the Corps providing any sort of hydrological connection, even in the absence of evidence that water from the non-navigable area actually reaches the navigable water. See, e.g. United States

v. Rueth Development Co., 335 F.3d 598 (7th Cir. 2003) and United States v. Deaton, 332 F.3d 698 (4th Cir. 2003). Yet, as explained by the Fifth Circuit, a definition of "navigable waters" that would include all waters that have any hydrological connection with "navigable water" is "unsustainable under SWANCC." In re Needham, 354 F.3d 340 (5th Cir. 2003).

A. The Extension Of CWA Jurisdiction To Waters That Have Only An Intermittent, Indirect, Tenuous Or Remote Hydrological Connection To Navigable Waters Exceeds The Corps's Authority Under The CWA

In Rueth, the district court reasoned that if "a molecule" of water from the disputed wetland eventually intermingles with the molecules of a navigable water, the Corps has jurisdiction: "A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River . . . the Site, therefore, has the 'significant nexus' to a navigable waterway [required by SWANCC]." Rueth, 189 F. Supp. 2d 874, 878. This "migratory molecule" theory, which is perhaps the most extreme and aggressive construction of the Corps's authority acknowledged in the wake of SWANCC, has already spread to other courts, including the Fourth Circuit in Deaton.[5]

Staking CWA jurisdiction upon an indirect, tenuous

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[5] The Fourth Circuit in Deaton, while showing respect for the notion that there must be at least a hydrologic connection, did not require the connection to be significant, allowing for regulation if a drop of water could potentially end up in the navigable water no matter how far this molecule would migrate and regardless of the path it would take. Deaton, 332 F.3d at 714.

hydrological connection quite simply ignores the clear import of SWANCC. A "significant nexus" constitutes more than a mere hydrological connection or "migratory molecule" but rather should require the Corps to establish that there is a discernable, discrete and uninterrupted surface water connection between the wetlands and/or "wet" area involved and a navigable-in-fact water. "Consequently, . . . the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." Needham, 354 F.3d. at 345.

Amici submit that asserting CWA jurisdiction based upon an intermittent, remote or indirect connection to a navigable water -- without any consideration of the connection between a given discharge and the water quality of the navigable water -- expands CWA jurisdiction well beyond the limits set by Congress. "Significant nexus" requires limiting principles because, if an indirect connection is enough to create jurisdiction, then the Corps will have jurisdiction over practically every drop of water anywhere in the nation, unless that drop of water is caught in a jar as rainfall from the sky.[6] *Amici* submit that, in determining if a discrete hydrologic connection exists, evidence of one or more of the following criteria should apply:

First, non-navigable waters should not be determined to be connected "navigable waters" by virtue of some temporary, artificial and reversible man-made conveyance, such as a ditch, swale, pipe, storm drain or similar manipulation. The Eastern District Court of Virginia recognized this problem in United States v. Newdunn

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[6] Justice Stevens, dissenting in SWANCC, noted that most wetlands designated as "isolated" in fact have some degree of hydrological connection to the surrounding water system. SWANCC, 531 U.S. at 176, n.2.

Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002); rev'd, Treacy v. Newdunn Associates, 344 F.3d. 407 (4th Cir. 2003). In rejecting Corps jurisdiction over a wetland site connected to navigable water by a series of swales and drainage culverts, the court noted that defining a storm drain as a tributary would unreasonably expand Corps jurisdiction because any property connected to a storm drain system could be regulated (presuming that water discharged into a storm drain eventually found its way to navigable water somewhere down its path). Moreover, allowing for use of man-made tributaries when calculating the reach of jurisdiction creates jurisdiction that shifts whenever a new culvert is laid or removed. Id. at 765 ("wetlands could alternately become jurisdictional or non-jurisdictional in tandem with adjacent road and storm drainage construction.")

Second, a wetland or pond created in uplands for various purposes such as sediment control should not be considered jurisdictional absent a clear surface connection to a navigable water. For example, members of NSSGA often create surface mining pits in uplands as settling basins for materials excavated during aggregate mining. Such basins must be reclaimed under state law and cannot be simply "abandoned" when the mining ceases. However, while, the Corps concedes that waters of the United States does not include "pits excavated in dry lands for the purpose of obtaining fill, sand or gravel, unless or until the construction or excavation is abandoned," the agency "reserves the right on a case-by-case basis to determine that a particular water body within these categories of waters is a water of the United States." 51 Fed. Reg. 41206, 41217 (1986). Such waters, by definition, cannot be part of a "connected" tributary system during mining and should also be excluded after mining ceases and reclamation is completed without clear evidence that they have become "inseparably" linked to

navigable waters via a natural surface channel.

Third, "wet" spots such as vernal pools, ephemeral[7] areas that pond after rain events, mud puddles, indistinct depressions and farm ditches that lack any evidence of continuous surface flow to navigable waters should not be considered jurisdictional. An acceptable indicator of surface flow between the "wet area" and the navigable water might include a continuous "ordinary high water mark" ("OHWM").[8] However, manmade structures should be considered in assessing whether regular flow has been interrupted and can prevent establishment of an OHWM. For example, a wetland adjacent to a ditch where that ditch follows an indistinct path to a navigable water interrupted by uplands and manmade structures would not have the requisite substantial nexus to that navigable water. In United States v. RGM Corp., 222 F. Supp. 2d 780 (E.D. Va. 2002), the court rejected the suggestion that manmade

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[7] The Corps defines "ephemeral streams" as having "flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." 65 Fed. Reg. 12818, 12897 (March 9, 2000). This lack of a continuous flow does not comply with "significant nexus" principles laid out in SWANCC.

[8] The term "ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(e).

obstacles, such as catch basins and culverts, are not considered interruptions of a continuous OHWM, noting that the Corps engages in circular logic by relying on manmade features (such as ditches) to assert the presence of a continuous hydrological connection, while attempting to disavow their presence when they interrupt the connection. Id. at 788.

Fourth, ground water alone should not create a hydrologic connection, unless the wetland connected by groundwater is directly abutting a navigable water so as to be "inseparably bound up" with that water (as in Riverside Bayview). As the Fifth Circuit explained in Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), it would be an unwarranted expansion of the CWA to conclude that a discharge that migrates into a navigable water via natural groundwater seepage could become a "discharge" into a navigable water. Id. at 271 (Congress was aware of the connection between groundwater and surface water but nonetheless decided to leave groundwater unregulated under the CWA).

B. Evidence Of Significant Impact To The Water Quality Of A Navigable Water Is Necessary To Demonstrate That A Non-Navigable Water Is "Inseparably Bound Up" With A Navigable Water

Amici are concerned that in requiring merely an indirect hydrological connection, the courts lose sight of the underlying purpose that Congress sought to achieve in enacting the CWA. The connection must not only be direct but there must be evidence that the pollutants discharged into the "connected" water will eventually discharge into and "significantly" impair the water quality of the navigable water. Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000). Hence, where the discharge of the pollutant will not have a "significant" impact on a navigable water that is hydrologically connected, there is no "substantial nexus."

The district court in Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), correctly required a showing by the Corps that "navigable[-in-fact] waters [were] impacted by Defendant's activities," in order for those activities to be regulated under the CWA. 190 F. Supp. 2d at 1017. The analysis of the District Court of New Jersey in FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D.N.J. 2003) is also instructive. In FD & P the court analyzed the differing interpretations of SWANCC, and held that after SWANCC "the 'hydrological connection' test is no longer the valid mode of analysis." Id. at 516. Rather, the court held that the Corps must demonstrate evidence of "substantial injurious impact" to a navigable water – which goes "beyond a mere hydrological connection." Id. According to the court, the question of whether there is a "substantial nexus" turns on whether "filling of the wetlands will have a substantial injurious impact upon the chemical, physical and/or biological integrity of the [navigable waterway]." Id. at 517. Applying this test, the FD & P court denied the Corps's motion for summary judgment despite the Agency's broad assertions that "the filling of the wetlands would have an injurious impact on the River by increasing the sediments and chemicals flowing into the River....and would displace flood storage capacity." The court noted that the contrary factual claims of F D & P created a genuine issue of material fact as to whether there is a "substantial nexus" between the wetlands and the Hackensack River.

These decisions are consistent with the Fifth Circuit's analysis in Rice, which held that there must be "a close, direct and proximate link" between the discharge of a

pollutant in the non-navigable water and any resulting actual, identifiable impact to natural surface water. Rice, 250 F.3d at 272. Further, as the Second Circuit recently held, the simple "potential" for a discharge is not enough to regulate the underlying activity Water Keeper Alliance v. US EPA, 399 F.3d 486, 505 (2d Cir. 2005) (explaining that the CWA "gives the EPA jurisdiction to regulate and control only actual discharges – not potential discharges, and certainly not point sources themselves").

Principles developed by Justice O'Connor in her concurring opinion in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708-14 (1995) (O'Connor, J., concurring), provide a good framework for analysis in determining whether a discharge would have a "substantial injurious impact" to navigable waters. In Sweet Home, the Court addressed a US Fish and Wildlife Service rule that determined whether "habitat modification" would result in a Section 9 "take" of species listed as "endangered" under the Endangered Species Act. See 16 U.S.C. § 1538. In agreeing with the majority that "significant habitat modification must cause actual, as opposed to hypothetical or speculative, death or injury" to protected species, Justice O'Connor noted that such a test implicates "ordinary principles of proximate causation, which introduce notions of foreseeability." Id. at 709 (O'Connor, J., concurring).

More recently, this Court in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), embraced a similar principle of "proximate causation" in the context of the agency's underlying authority. In finding that the National Environmental Policy Act ("NEPA") did not require the Federal Motor Carrier Safety Administration ("FMCSA") to consider the environmental effects arising from the entry of Mexican trucks as a result of the President's lifting or modification of the moratorium against such entries, this Court found it significant that the FMCSA

lacked discretion to prevent such operations. Id. at 766. Consequently, the Court held that, the "but for" test of causation was "insufficient to make the agency responsible for a particular environmental effect under NEPA and the relevant regulations." Id. at 767.

These principles of proximate causation and notions of forseeability, consistent with an agency's underlying authority to act, can similarly be applied to discharges under the CWA in determining "substantial injurious effects" to navigable waters. For example, evidence that an oil or chemical discharge into a "connected" tributary would actually reach the navigable water might be sufficient to establish jurisdiction over the discharge. However, evidence that filling an isolated (tenuously connected) wetland that would not foreseeably and substantially impair the functions of a navigable water several miles away, should be enough to preclude jurisdiction over the discharge activity. While the exact nature and extent of the evidence needed to establish such a causal linkage may vary from case to case, such a test will put an end to the Corps and EPA's presumption that any filling of wetlands or discharge of pollutants is automatically subject to CWA jurisdiction due to the interconnected nature of all aquatic systems.

III. THE SIXTH CIRCUIT'S BROAD INTERPRETATION OF "NAVIGABLE WATERS" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES

By federalizing any wet area, no matter how remote from navigable waters, the Sixth Circuit adopted an

unprecedentedly broad interpretation of the geographic scope of CWA jurisdiction. As this Court held in SWANCC, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress" that such a result was intended. 531 U.S. at 174. In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA.

One of the principal tenets of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (citation omitted). In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. See SWANCC, 531 U.S. at 172. Indeed, this Court has recognized that there is an underlying assumption that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . . [that] Congress does not exercise lightly." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Activities That Do Not Add Pollutants to Navigable Waters

Of course, as long as Congress is acting pursuant to one of its enumerated powers, the Supremacy Clause of the Constitution permits Congress to trump state law, even in

areas (such as land and water use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, courts must not simply assume that Congress has used its power to override state authority. See SWANCC, 531 U.S. at 172-73. Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. See Gregory, 501 U.S. at 464.

The Sixth Circuit's expansion of CWA jurisdiction beyond waters with a "substantial nexus" to navigable waters will clearly upset the "cooperative federalism" inherent in the CWA. Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. § 1251(b) (2000). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." Id. § 1370(2) (2000).[9]

A review of the plain language of the CWA provides

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[9] See also 33 U.S.C. § 1288 (2000) (encouraging states to develop area-wide management plans).

nothing approaching a "clear statement" from Congress that it intended CWA jurisdiction to extend to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote. In truth, far from being "unmistakably clear" that Congress intended the statutory term "water of the United States" to encompass every wet spot, Congress set forth the very specific limit that water must be "navigable" in order to fall within the scope of the CWA. The "waters" that the Sixth Circuit would have regulated are more properly addressed under the state and local land use processes. This careful balance between state and federal power should not be upset.

B. The Sixth Circuit Would Upset The Delicate Balance Between The CWA And Comprehensive State And Local Programs For Controlling Water Pollution

Amici recognize the legitimate objective of the CWA to protect the Nation's waters. However, the CWA does not extend federal authority to all wetlands and waters in the Nation. Fundamental principles of federalism dictate that control of land use decisions are properly within the purview of State and local governments. Indeed, the Court has recognized that "regulation of land use is perhaps the quintessential state activity." See Fed. Energy Regulatory Comm'n v. Miss., 456 U.S. 742, 767 n.30 (1980). As discussed above, the CWA bestows "primary" responsibility upon the States to protect water resources. The literally thousands of State and local governments that regulate wetlands and waters firmly establishes that the States have enthusiastically assumed this role.[10]

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[10] See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries

State and local governments throughout the Nation have passed comprehensive wetland laws, many of which are broader in scope than the CWA and provide far greater protection. In fact, several states began regulating these areas well before the federal government. "The first wetlands protection statute in the United States was passed in Massachusetts in 1963. . . . By the time Congress enacted the CWA in 1972, Massachusetts had nine years of experience regulating wetlands, and was already reforming its laws to provide greater local control and accountability while maintaining state-level oversight." Jonathan H. Adler, Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, 29 Envtr. L. 1, 48 (1999).

State-based clean water laws are typically far broader than their federal counterpart – regulating a broader scope of waters. Maryland is an excellent example of a state that has regulatory regime that goes beyond the 404 program, having enacted one of the first laws declaring a goal of "no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions." See MD Code. Ann. Envir. Sect. 5- 902 (1996). The Maryland law covers "both surface and underground waters within the boundaries of the state." MD. Code Ann., Envir. Sec. 5-102. In turn, California's Porter-Cologne Water Quality Control Act broadly defines "waters of the State" as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water

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and Wildlife of the Senate Comm. on Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

Code Sec. 13050.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has also recognized the essential role played by the States in the protection of wetlands and other waters even as to the permitting of point source discharges, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[11]

The Sixth Circuit's expansive interpretation of jurisdiction under the CWA threatens to displace the important role played by the States in the regulation of their aquatic resources. Because such an outcome was never intended by Congress, this Court should reverse the Sixth Circuit's decisions below.

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[11] USEPA Office of Wetlands, Oceans, and Watersheds, State or Tribal Assumption of the Section 404 Permit Program (May 25, 1999) available online at http://www.epa.gov/owow/wetlands/facts/fact23.html.

CONCLUSION

Amici respectfully request this Court to reverse the Sixth Circuit's rulings and provide clear limiting principles in determining the reach of jurisdiction under the Clean Water Act.

Respectfully Submitted,

LAWRENCE R. LIEBESMAN *
RAFE PETERSEN
ETHAN ARENSON
STUART TURNER
Holland & Knight LLP
2099 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-3000
Counsel for Amici Curiae
* *Counsel of Record*

No. 04-1034 and No. 04-1384

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS, *et al.*,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondents,

JUNE CARABELL, *et al.*,

Petitioner,

-v.-

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, NY 10007
(212) 788-1585

LEONARD J. KOERNER,*
HILARY MELTZER,
AMANDA C. GOAD,**
of Counsel.

*Counsel of Record
**Awaiting Admission to the Bar of the State of New York

January 13, 2006

QUESTION PRESENTED

The City of New York ("City") relies on wetlands to protect and improve water quality in the watershed of its surface drinking water supply system. The question the City addresses is whether Clean Water Act protection extends to all wetlands that provide such water quality benefits, and that thus have a significant nexus, to navigable waters.

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae the City of New York ("City") submits this brief in support of respondents United States of America, United States Army Corps of Engineers ("Army Corps"), and United States Environmental Protection Agency ("EPA") seeking affirmance of the United States Court of Appeals for the Sixth Circuit's decisions in *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) and *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).[1]

The City, a political subdivision of the State of New York, owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply is not currently filtered and, based on the high quality of the water and the City's long-term plans for protecting against its degradation, EPA has granted a filtration avoidance determination[2] for the City's Catskill

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[1] Pursuant to Rule 37.6 of this Court, the City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City and its representatives made any monetary contribution to the preparation or submission of this brief. Consent to the filing of amicus briefs in support of either party was filed by counsel for the Rapanos petitioners on November 1, 2005, and by counsel for the Carabell petitioners on November 25, 2005. Counsel for respondents has consented to the filing of this brief, and a letter reflecting that consent is submitted to the clerk's office with this brief.

[2] Public water systems must either provide filtration or must demonstrate that they meet the rigorous requirements for filtration avoidance. 42 U.S.C. § 300g-1; 40 CFR §§ 141.71 and 141.171.

and Delaware water supply systems.[3] Together, the Catskill and Delaware systems supply approximately 90% of the City's drinking water. The water in the oldest of the City's three interconnected water supply systems, the Croton system, is scheduled to be filtered by 2011, but generally meets all applicable water quality requirements and is currently unfiltered.[4]

The extremely high quality of the City's water thus derives not from mechanical treatment but rather from the protection and treatment provided naturally within the nearly 2000 square miles of land that drain into the City's nineteen collecting reservoirs, including the extensive wetlands – approximately 25,800 acres – in that watershed area.

Within a watershed (the land area that drains into an ultimate receiving water), wetlands provide multiple functions that benefit the receiving water body. They ameliorate non-point source pollution by removing sediment, nutrients, and other pollutants from influent water sources.[5] They absorb water during high surface

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[3] *See* United States Environmental Protection Agency, New York City Filtration Avoidance Determination, (November 2002), available at http://www.epa.gov/Region2/water/nycshed/fad2002.pdf.

[4] Unlike the watersheds of the Catskill and Delaware supply systems, which consist largely of forested land west of the Hudson River, the Croton watershed is in more densely developed counties close to the City. Accordingly, the quality of Croton water has been adversely affected by development.

[5] Wetland vegetation ("hydrophytic vegetation") absorbs nutrients through biotic uptake, and slows the flow of surface waters, promoting sedimentation. The low oxygen conditions in

flow events storms and snowmelt, which decreases the volume and velocity of water entering streams and thus prevents or reduces downstream flooding and erosion. Wetlands also release stored water slowly back into streams, through surface outflows or groundwater recharge, maintaining stream flow within the watershed even under dry conditions.

Wetlands may occur in a variety of settings within a watershed. Many wetlands are within riparian zones along intermittent and perennial watercourses. Others are geographically remote from streams, surrounded by uplands, with discernable surface water connections to tributary systems only during periods of high flows, if ever. The benefits described above, which are critical to maintaining water quality in the City's watershed in particular, and in navigable waters in general, are provided by all wetlands within a watershed, regardless of how direct or frequent their surface connections to streams may be.[6]

The invaluable benefits provided by wetlands are particularly important in watersheds in which there has been significant land development, where stormwater runoff from impervious surfaces (i.e., surfaces which do not allow water to be absorbed into the ground, such as buildings and paved surfaces) may be a serious cause of

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wetland soils ("hydric soils"), resulting from their periodic saturation or inundation, promote biogeochemical transformations, such as denitrification. Thus, a variety of physical and biogeochemical mechanisms allow wetlands to remove nutrients, sediments, and other pollutants.

[6] A more detailed description of the functions of wetlands throughout a particular watershed is provided below.

pollution and degradation of surface waters. Stormwater runoff from developed areas transports pollutants, including nutrients from fertilizers, oil and grease from roadways, and sediments from improperly managed construction sites, to surface waters.[7] Similarly, impervious surfaces associated with development increase the volume and velocity of stormwater runoff.[8] Wetlands, as further described below, offer a valuable and natural means for dealing with these issues. Yet, development and associated land use changes are primary causes of loss and degradation of wetlands.[9]

The protection of wetlands through regulation is therefore critical. Wetlands protection regulations afford expert agencies, and the public, the opportunity to review and consider the value of wetlands in guarding against pollution, and the impacts of land use activities that will disturb, impair, or destroy wetlands.

The extensive freshwater wetlands in the City's watershed are protected pursuant to a variety of federal,

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[7] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WHAT IS NONPOINT SOURCE (NPS) POLLUTION, QUESTIONS AND ANSWERS (August 18, 2003), available at http://www.epa.gov/OWOW/NPS/qa.html.

[8] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MANAGING URBAN RUNOFF: POINTER NO. 7, (May 20, 2004), available at http://www.epa.gov/owow/nps/facts/point7.htm.

[9] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WETLANDS: STATUS AND TRENDS (March 23, 2005), available at http://www.epa.gov/OWOW/wetlands/vital/status.html.

State, and local laws and regulations. The City has unusual, extraterritorial authority to review and approve certain activities in and adjacent to certain wetlands within the watershed of its drinking water supply. N.Y. Pub. Health Law § 1100(1) (McKinney 2005); N.Y. Comp. Codes R. & Regs. tit. 10, Part 128 (2005). The City's regulatory authority, however, like New York State's, is generally limited to wetlands exceeding 12.4 acres. N.Y. Comp. Codes R. & Regs. tit. 10, § 128-1.6(a)(116) (2005); N.Y. Comp. Codes R. & Regs. tit. 6, § 663.2(p) (2005). Based on the City's inventory of wetlands in the watershed of its water supply, nearly 10,000 acres, or 40 percent of these wetlands are not subject to regulation by New York State or the City because they do not meet the size threshold. Moreover, of these smaller wetlands, which nonetheless provide significant water quality benefits, approximately 4,300 acres, or 43 percent, lack regular, obvious surface connections to surface waters.

In contrast, the federal Clean Water Act regulates wetlands based on hydrology, soils, and vegetation rather than on size. *See, e.g.*, 33 C.F.R. § 328.3(b) (2006). The City thus relies on federal protection of smaller wetlands within its watershed. Indeed, recognizing the essential importance of small wetlands in the portion of the City's water supply system most affected by development, the ACOE has designated the City's Croton watershed as a Critical Resource Water. As a consequence, many of the "Nationwide Permits" that generally authorize projects disturbing less than half an acre of wetlands, subject to certain categorical conditions, do not apply in the Croton watershed, and thus any activity that will disturb a wetland – regardless of the size of the wetland or extent of disturbance – requires an individual permit. *See* Issuance of Nationwide Permits; Notice, Part II, 67 Fed. Reg. 2020, 2093 (Jan. 15, 2002).

The functioning of wetlands including wetlands that lack discernable surface connections to streams – in a typical sub-watershed within the City's water supply system is described below. Because of the critical importance of such wetlands, the City respectfully urges this Court to affirm that the Clean Water Act establishes jurisdiction over all wetlands with a significant nexus to the quality and quantity of the Nation's navigable waters.

SUMMARY OF ARGUMENT

Since 1972, the Federal Water Pollution Control Act, or "Clean Water Act," has provided a comprehensive framework for federal efforts to protect waters of the United States. 33 U.S.C. § 1251 *et seq.* Its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Pursuant to Section 404(a) of the Act, any person must obtain a permit from the Army Corps of Engineers before discharging "dredged or fill material" into navigable waters. 33 U.S.C. § 1344(a). The Army Corps' regulations implementing Section 404(a) specify that permits are required for all fill activities that affect navigable waters, either directly or indirectly via tributary water bodies or wetlands. 33 C.F.R. §§ 320-29.

In *United States v. Riverside Bayview Homes*, this Court upheld the Army Corps' jurisdiction over wetlands adjacent to navigable waters, deferring to "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands." 474 U.S. 121, 134 (1985) ("*Riverside Bayview*"). In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, this Court clarified the scope of federal Clean Water Act jurisdiction by requiring a "significant nexus" between the regulated wetland and traditionally navigable waters. 531

U.S. 159, 167 (2001) ("*SWANCC*"). Several appellate courts, including the United States Court of Appeals for the Sixth Circuit in the instant cases, have used this type of analysis to sustain federal jurisdiction over wetlands that affect the quantity and quality of surrounding navigable waters, even when their hydrological connections to the navigable waters are intermittent or circuitous. *See, e.g., United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005); *Treacy v. Newdunn Associates*, 344 F.3d 407, 417 (4th Cir. 2003). Federal authority to restrict filling of such wetlands stems from the power to regulate activities which, particularly in the aggregate, "substantially impact interstate commerce," as discussed in *United States v. Lopez* 514 U.S. 549, 557 (1995). *See also Gonzalez v. Raich*, 125 S.Ct. 2195, 2205-08 (2005).

The City of New York, as the manager of a large and complex drinking water system and a regulator of certain land use activities in its watershed, shares the Army Corps' considered view that protecting hydrologically and ecologically connected wetlands is essential to protecting the quality and quantity of navigable waters. In fact, it would not be possible to achieve the stated purpose of the Clean Water Act if federal agencies lacked authority to regulate wetlands that satisfy the "significant nexus" test.

WETLAND FUNCTIONS WITHIN A WATERSHED

To illustrate the nexus of wetland protection to the protection of navigable waters, and particularly to emphasize the importance of small and remotely connected wetlands in protecting water quality, the City describes the water quality benefits provided by various wetlands within

the watershed of the City's West Branch reservoir. The West Branch reservoir is located within the City's Croton water supply system which, as noted above, is the most affected by development of the City's three interconnected water supply systems. It is a critical reservoir to the City, as it generally receives water from the City's Delaware Aqueduct, which carries approximately 50% of the City's entire water supply from four reservoirs to the west of the Hudson River, as well as from its own watershed.

Streams in the lowest portions of the watershed of the West Branch reservoir have the largest drainage areas, highest flows, and are typically navigable by canoe or kayak. Wetlands along these mainstem waters comprise roughly 40% of the wetland area in the West Branch reservoir watershed. When the flows in these streams exceed channel capacity – when the streams reach flood stage – adjacent wetlands detain and remove sediments, nutrients, and other pollutants from the floodwaters, minimizing flood damage and maintaining water quality. Data collected by the City from wetlands along Gipsy Trail Creek, a large stream in the West Branch reservoir watershed, show a net retention of flow, dissolved phosphorus, and suspended solids during the highest stream flows. In addition to the obvious benefit of such reduced flooding to riparian lands, the lower stream velocities produced by these wetlands mitigate against the erosion and suspension of sediments associated with high and rapid waters.

A system of "headwater" wetlands occurs in the upper reaches of the West Branch basin stream network, often at the sources of streams. These headwater wetlands comprise over 50% of the wetlands in the West Branch reservoir watershed, and all have intermittent or ephemeral surface connections to the mainstem channels that are

tributary to the West Branch reservoir. These headwater wetlands perform a multitude of functions and are among the most important for the quality of surface waters, despite their typical lack of perennial connections.

Headwater wetlands have the greatest opportunity of all wetland types to ameliorate non-point source pollution as they remove nutrients, sediment, and other pollutants from surface runoff *before* it is transported through the upstream tributaries into the mainstems of the watershed.[10] Of the wetlands predicted by the United States Fish and Wildlife Service ("USFWS"), in its functional assessment of wetlands in the City's Croton watershed, to be significant for nutrient transformation and sediment retention in the West Branch reservoir basin, 49% and 67%, respectively, are along headwater tributaries.[11] Headwater wetlands slow the velocity of surface runoff, which stabilizes stream banks and prevents erosion and associated water quality degradation. Forty percent of the wetlands predicted by the USFWS to be significant for shoreline stabilization in the West Branch watershed are in headwater positions.

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[10] NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001) available at http://books.nap.edu/catalog/10134.html.

[11] R.W. TINER, C.W. POLZEN, AND B.J. MCCLAIN, UNITED STATES FISH AND WILDLIFE SERVICE, WETLAND CHARACTERIZATION AND PRELIMINARY ASSESSMENT OF WETLAND FUNCTIONS FOR THE CROTON WATERSHED OF THE NEW YORK CITY WATER SUPPLY SYSTEM (2004), prepared for and available from the New York City Department of Environmental Protection, Valhalla, NY. Subsequent references in this section to USFWS predictions also refer to this report.

In addition to these water quality benefits, headwater wetlands detain surface water from their catchment areas, which reduces and delays peak stream flows, thus reducing the frequency and severity of floods. In its watershed-scale functional assessment, USFWS estimated that approximately half of the wetlands that are significant for surface water detention in the West Branch reservoir watershed are located in headwater positions. Another study of the Croton Watershed found decreased peak flow and increased lag time between the period of maximum rainfall and maximum runoff in a sub-basin that contained a headwater wetland when compared to a similar sub-basin without such wetlands.[12]

Headwater wetlands are also important for maintaining stream flow, as detained stormwater is released slowly to stream channels during times of low flow. Ninety percent of wetlands predicted by the USFWS to be highly significant for streamflow maintenance in the West Branch Reservoir Watershed are along headwater tributaries. In addition, many of these headwater wetlands replenish groundwater, which forms the base flow for tributaries during dry periods.

Finally, a number of wetlands lack regular surface connections to tributary systems. These geographically isolated wetlands comprise approximately 4% of the wetland area in the West Branch reservoir watershed. Despite their lack of discernable surface water connections, these wetlands, like those in headwater wetland positions, are important for detaining surface waters and ameliorating

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[12] JAMES HASSETT, STATE UNIVERSITY OF NEW YORK COLLEGE OF ENVIRONMENTAL SCIENCE AND FORESTRY, THE CROTON PROCESS STUDIES PROJECT (2003).

non-point source pollution from their local catchment areas. Because they lack outflows, these wetlands serve as permanent "sinks" for precipitation, overland flow and any associated nutrients and pollutants that would otherwise flow to downgradient waters in surface runoff. These "isolated" wetlands also restore groundwater resources and thus contribute to the base flows of downgradient surface waters.

The wetlands in the West Branch reservoir watershed thus all have a significant nexus to water quality and quantity in the West Branch reservoir, among other navigable water bodies.

ARGUMENT

I

THE CLEAN WATER ACT PROVIDES FEDERAL JURISDICTION OVER ANY WETLAND WITH A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS.

It is well established that protection of wetlands was integral to Congress' efforts to preserve water quality on a broad scale under the Clean Water Act. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In *Riverside Bayview*, respondents challenged the Army Corps' jurisdiction over Michigan wetlands they sought to fill in preparation for construction of housing, arguing that jurisdiction under the Clean Water Act did not extend to an area of "low-lying, marshy land" adjacent to a navigable lake. *Id.* at 124. The Court rejected that argument, concluding that "the language, policies, and history of the Clean Water Act" supported the Army Corps' determination that wetlands adjacent to navigable waters were subject to Clean Water Act regulation. *Id.* at 139. In

unanimously upholding federal jurisdiction over these wetlands, the Court observed:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134. The Court did not define or limit the application of the term "adjacent" in *Riverside Bayview*. Rather, the decision emphasized the ecological necessity of protecting nearby wetlands in order to protect the navigable waters with which they were connected. *Id.*

Significantly, the Court based its *Riverside Bayview* holding largely on deference to the Army Corps' scientific conclusions about the role of adjacent wetlands in preserving the quality of navigable waters. The Army Corps had determined that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams" because the wetlands may "drain into" the larger water bodies, and that they "may serve to filter and purify water draining into adjacent bodies of water ... and to ... prevent flooding and erosion...." *Id.* at 134. The Court concluded that these determinations, rooted in "the Corps' and EPA's technical expertise," were reasonable. *Id. See also United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2001) ("breadth of congressional concern for protection of water quality and aquatic ecosystems" justifies federal Clean Water Act jurisdiction over headwater wetlands whose waters sometimes flow through drainage ditches into the

natural tributary system of a navigable river), *cert. denied*, 541 U.S. 972 (2004); *United States v. Pozsgai*, 999 F.2d 719, 727-34 (3rd Cir. 1999) (citing broad jurisdictional scope envisioned in legislative history of Clean Water Act in upholding federal regulation of wetland adjacent to navigable waters).

This Court next addressed the issue of Clean Water Act jurisdiction over wetlands in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2000). Under *SWANCC*, which affirmed *Riverside Bayview*, federal regulators must demonstrate a "significant nexus" between the wetland in question and traditionally navigable waters in order to establish jurisdiction under Section 404(b) of the Clean Water Act.[13] *Id.* at 167.

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[13] This test has also been used to justify Clean Water Act jurisdiction over water bodies other than wetlands that are not navigable in fact, but which affect navigable waters. In *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), for example, the Ninth Circuit held that certain irrigation canals were subject to federal Clean Water Act jurisdiction. *Id.* at 528-29. Although a system of mechanical gates separated the artificial canals from nearby natural streams under normal circumstances, the court found that occasional water leaks from the canals into the streams were sufficient to render them "connected" and to establish Army Corps jurisdiction over the canals. *Id.* at 533-34. *Cf. United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (upholding Clean Water Act jurisdiction over artificial drainage ditches, which intermittently fed into larger conduits which in turn emptied into Tampa Bay, noting that polluted water need not flow "immediately or continuously" from a non-navigable tributary into navigable waters "in order to inflict serious environmental damages").

In *SWANCC*, the Court ruled that a significant nexus to navigable waters did not exist where the only asserted basis for Army Corps jurisdiction over the wetlands in question was their serving as habitat for migratory birds. *Id.* Because the Army Corps' claim to jurisdiction was based exclusively on the "Migratory Bird Rule," the *SWANCC* Court focused on the inadequacy of that rule rather than on the question of the requisite hydrological connection between wetlands and navigable waters.

Thus, the specific holding in *SWANCC* has little bearing on the cases now before this Court, where hydrological connections between the wetlands at issue and navigable waterways have been demonstrated. In establishing the "significant nexus" test, however, the Court signaled that the determination of Clean Water Act jurisdiction over wetlands is appropriately made by agencies with technical expertise to evaluate the nature of the hydrological connections between wetlands and navigable waters.

In applying this Court's decisions in *Riverside Bayview* and *SWANCC*, courts have generally deferred to expert agencies when they have found a "significant nexus" between wetlands and navigable waters, even where the hydrological connections have been seemingly remote. In *Treacy v. Newdunn Associates*, for example, the Fourth Circuit upheld federal jurisdiction over wetlands connected to a traditionally navigable river through natural and artificial waterways, even though water flowed from the wetlands only "intermittently" and traveled along a convoluted 2.4 mile path, including a ditch running under an interstate highway, before reaching the river. 344 F.3d 407, 417 (4th Cir. 2003), *cert. denied, Newdunn Assocs. v. United States Army Corps of Engineers*, 541 U.S. 972

(2004). In *United States v. Deaton*, *supra*, the Fourth Circuit also found Clean Water Act jurisdiction over a wetland area whose path of hydrological connection to a navigable river stretched more than eight miles and consisted in part of a human-made roadside ditch.

Similarly, in *Northern California River Watch v. City of Healdsburg*, a district court found a significant nexus between an artificial gravel pit and the nearby Russian River, where "the wetlands in question help[ed] filter pollutants entering the aquifer and hence the river proper." No. C01-04686, 2004 U.S. Dist. LEXIS 1008, *29 (N.D. Cal. Jan. 23, 2004), No. 04-15442 (9th Cir. argued Nov. 16, 2005). Based on this finding of a direct water quality benefit provided by the wetland, the court held that federal jurisdiction was appropriate even though the water was exchanged through an underground aquifer rather than a surface connection. In *United States v. Lamplight Equestrian Center*, the Northern District of Illinois found Clean Water Act jurisdiction appropriate where seasonally saturated ground adjacent to a drainage ditch created an intermittent hydrological connection to a navigable river, observing that "[w]ater need not flow in an unbroken line at all times to constitute a sufficient connection to navigable water or its tributaries" for federal Clean Water Act jurisdiction. No. 00 C 6486, 2002 U.S. Dist. LEXIS 3694 at *20-*23 (N.D. Ill. Mar. 8, 2002).

In the cases now before the Court, the government has reasonably determined that the wetlands at issue are hydrologically connected to navigable waters and have a significant nexus to water quality and quantity in those waters. *Rapanos*, 376 F.3d at 634, 639-40; *Carabell*, 391 F.3d at 708-10. The Rapanos petitioners, whose wetlands bear an important hydrological connection to navigable waters, *Rapanos* at 642-43, challenge federal jurisdiction

because of the artificial nature of portions of the connection and the length and circuity of the route water travels between the wetlands and navigable waters. Where the agency with authority and expertise has found a significant nexus, however, these arguments must fail. *Deaton*, 332 F.3d 698; *Northern California River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008.

Similarly, in *Carabell*, the court focused on the Army Corps' finding that the wetlands at issue provided "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in" downgradient navigable waters. 391 F.3d at 706. As in *Treacy*, 344 F.3d 407, and *Lamplight Equestrian Center*, 2002 U.S. Dist. LEXIS 3694, the intermittent nature of a connection does not destroy its ecological significance during the seasons when flooding or seepage occur.[14]

Petitioners ask this Court to evaluate the hydrological connections between the particular wetlands at issue in the instant cases and navigable waters, and to make a determination that these connections are insufficient to give rise to Clean Water Act jurisdiction. As this Court has appropriately recognized, however, such determinations must be made by experts, based on site-specific information about the effects wetlands have on their receiving waters. *See Riverside Bayview*, 474 U.S. at 133-134; *SWANCC* 531 U.S. at 167.

Wetlands within a watershed may contribute significant base flow to, attenuate erosive flows in, and

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[14] Indeed, as noted above, wetlands perform many important functions during flooding.

remove excessive nutrients, sediments, and other contaminants from downgradient navigable waters. Such wetlands thus have a significant nexus to navigable waters, and should therefore be regulated under the Clean Water Act.

II

PRESERVATION OF WATER QUALITY BY REGULATING WETLANDS WITH A SIGNIFICANT NEXUS TO NAVIGABLE WATERS IS AN APPROPRIATE FEDERAL FUNCTION UNDER THE COMMERCE CLAUSE.

Contrary to the petitioners' protestations, federal jurisdiction over wetlands sharing a "significant nexus" with navigable waters of the United States is entirely appropriate under the Commerce Clause of the United States Constitution. Congress may properly assert jurisdiction pursuant to the Commerce Clause when it has a rational basis for believing that the regulated activity affects interstate commerce "sufficiently" to justify federal regulation. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

The Court has recognized three permissible categories of regulation under the Commerce Clause: regulation of channels of interstate commerce; protection of instrumentalities of interstate commerce, including persons or things traveling interstate; and regulation of activities "having a substantial relation to" or "substantially affecting" interstate commerce. *Id.* at 558-59. While federal Clean Water Act jurisdiction includes direct regulation of waters that are navigable in fact and thus constitute "channels of commerce," Congress appropriately

assumed jurisdiction over a much broader range of waters, tributary to or otherwise influencing navigable waters, because they "substantially affect" interstate commerce.[15]

In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), regulation of more than waters that are navigable in fact is thus required. To achieve the stated purpose of the Clean Water Act, agencies need the flexibility to regulate tributaries to the Nation's waters, wetlands with consistent or intermittent surface connections to such waters and, in some instances, wetlands which are hydrologically "isolated," but which nevertheless have a significant nexus to the commercial and ecological value of navigable waters.

In *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005), the Seventh Circuit rejected the argument that federal jurisdiction over privately owned wetlands exceeded the scope of federal Commerce Clause authority. Like the wetlands at issue in *Rapanos* and *Carabell*, and like many in the watershed of New York City's drinking water supply, the wetland at issue in *Gerke* was connected

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[15] In *SWANCC*, this Court considered whether Congress relied solely upon the "channels of commerce" basis of jurisdiction for the Clean Water Act but declined to reach a holding. 531 U.S. at 169 n.3, 172. Indeed, recognizing that the Clean Water Act covers activities well beyond the use of channels of commerce, the Court noted that to determine the extent of Clean Water Act regulation permissible under the Commerce Clause, it "would have to evaluate the precise object or activity that, *in the aggregate, substantially affects interstate commerce*." *Id.* at 173 (emphasis added). *See also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003).

only indirectly via a ditch, a creek, and then a nonnavigable "river" to a river that was navigable in fact. *Id.* at 805. The court held first that by restricting the filling of wetlands that "supply some of the water in navigable waterways," federal regulators were protecting channels of interstate commerce. The Seventh Circuit went on to note that federal jurisdiction is appropriate "even if the pollution has no [physical] effect on navigability" and the impact on navigable waters' quality is the sole basis for asserting federal jurisdiction. *Id.* at 807.

Although filling a single wetland might seem attenuated from interstate commerce, through aggregation such fill activities can "substantially affect interstate commerce" and thus trigger federal jurisdiction under the Commerce Clause. *See Gerke*, 412 F.3d at 806-07; *see also Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003) (Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'"); *Gonzales v. Raich*, __ U.S. __, 125 S.Ct. 2195, 2205-08 (2005).

As noted above, *SWANCC* and its subsequent interpretations have established that a "significant nexus" between a wetland and navigable waters is sufficient to justify federal regulation of the wetland. Where there is a significant nexus between wetlands and navigable waters, impairment of the wetlands significantly threatens water quality in the navigable body. This represents a "substantial relation" between the regulated activity (filling or other impairment of hydrologically connected wetlands) and interstate commerce (as practiced via navigable waters), and thus fulfills the test for Commerce Clause jurisdiction. *United States v. Lopez*, 514 U.S. 549; *United*

States v. Gerke Excavating, 412 F.3d at 806. *See also United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002); *United States v. Kung-Shou Ho*, 311 F.3d 589, 600-04 (5th Cir. 2002).

The functions of wetlands in the New York City watershed illustrate the substantial relationship between federal regulation of wetlands and interstate commerce. Ensuring that plans to dredge or fill wetlands are subject to appropriate reviews and approvals supports the maintenance of a clean drinking water supply – a service the absence of which would substantially affect interstate commerce. Protecting wetlands from fill and other impairments also helps wetlands store and discharge water when appropriate, thus ensuring a steady quantity and velocity of water flow in navigable bodies (in contrast to flood or drought conditions which can impair drinking water supplies). *See, e.g., Gerke*, 412 F.3d at 806.

CONCLUSION

For all the foregoing reasons, *amicus* the City of New York respectfully urges this Court to affirm the decisions of the Court of Appeals for the Sixth Circuit in order to avoid serious negative consequences for the many public agencies and authorities nationwide involved in maintaining clean and safe water supplies.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, New York 10007
(212) 788-1585

LEONARD J. KOERNER,*
HILARY MELTZER,
AMANDA GOAD,**
of Counsel.

*Counsel of Record
**Awaiting Admission to the Bar of the State of New York

(31) (27)

Nos. 04-1034, 04-1384

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, MICHIGAN, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, AND WISCONSIN, THE DISTRICT OF COLUMBIA, THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

MICHAEL A. COX
Attorney General of the State of Michigan
THOMAS L. CASEY
Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amici Curiae
(Additional Attorneys Listed on Signature Page)

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INTEREST OF AMICI CURIAE[1]

For three decades, federal and state agencies, courts, and private parties have understood the federal Clean Water Act to regulate the discharge of pollutants into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these bodies.[2] These cases present the question of whether the Act covers wetlands adjacent to non-navigable tributaries of traditional navigable waters — in particular, whether section 404 of the Act requires a person to obtain a permit from the U.S. Army Corps of Engineers before discharging dredge or fill material into these wetlands. While amici curiae States, the District of Columbia, the Pennsylvania Department of Environmental Protection, and the International Association of Fish and Wildlife Agencies ("IAFWA")[3] agree that

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1. Under Rule 37.4 of this Court, amici States and the District of Columbia are not required to obtain consent for the filing of this brief. The parties have consented to the filing of this brief by the Pennsylvania Department of Environmental Protection, a State agency, and the International Association of Fish and Wildlife Agencies. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation and submission.

2. In this brief, the phrase "traditional navigable waters" refers to waters that are used (or susceptible to use) in interstate or foreign commerce, and the phrase "non-navigable" or "headwater" tributaries refers to tributaries that are not traditional navigable waters. We note, however, that traditional navigable waters include many tributaries that historically were used in commerce by, for example, fur traders or timber companies floating logs to their mills. Additionally, in some States, waters that can be used by recreational vessels like canoes are considered "navigable."

3. The IAFWA is a not-for-profit corporation whose members include the fish and wildlife agencies of all fifty States, the Commonwealth of Puerto Rico, and seven Canadian provinces and territories, as well as federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources. For over one hundred years, the Association has coordinated efforts of public agencies responsible for protection and management of North American fish and wildlife resources, and it has participated as amicus curiae in more than 20 cases.

the federal government should regulate intrastate activity only when important national interests are at stake, the filling of or other discharge of pollutants into wetlands adjacent to the nation's tributaries presents such an occasion. Amici therefore urge this Court to affirm the Sixth Circuit's decisions in these consolidated cases.

The issues presented by these cases are important to amici for three reasons. First, water flows downhill, and each of the lower 48 States has water bodies that are downstream of one or more other States. As set forth in the Appendix to this brief, every State in the continental United States has at least one traditional navigable water with a portion of that river or lake within one or more other States; many have several such waters. Because wetlands adjacent to non-navigable tributaries profoundly influence the quantity, quality, and biological integrity of downstream waters, amici strongly support federal protection for these wetlands.

Petitioners are mistaken in suggesting that the regulation of wetlands adjacent to tributaries has no bearing on the regulation of either navigable waters or their non-navigable tributaries. Wetlands generally drain into the tributaries or other waters to which they are adjacent, and the vitality of the lower reaches of watersheds is inseparably connected with the vitality of tributaries and their adjacent wetlands. The federal agencies have thus properly applied the Act to both non-navigable tributaries and to the wetlands adjacent to them for over thirty years, and a contrary interpretation would frustrate the Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the nation's waters.

Second, maintaining consistency among water pollution programs throughout the nation is essential. The Clean Water Act is key to achieving this relative parity, because it creates a federal "floor" for water pollution control.

Third, over the past three decades, the States have come to rely on the Clean Water Act's core provisions and have structured their own water pollution programs accordingly. The States already play a vital role in administering parts of the Clean Water Act, but they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries.[4]

SUMMARY OF ARGUMENT

1. Wetlands are both practically and ecologically inseparable from the waters they abut. Because the Clean Water Act plainly covers the tributaries of traditional navigable waters, it covers the wetlands adjacent to those tributaries as well. Even if the primary goal of the Clean Water Act is viewed narrowly as merely controlling pollution in traditional navigable waters, coverage of wetlands adjacent to non-navigable tributaries is essential because a large portion of the pollution in traditional navigable waters is originally discharged into non-navigable tributaries and their adjacent wetlands.

Federal regulation is particularly important because discharges into non-navigable tributaries or their adjacent wetlands in one State often affect the waters of a downstream State. Without federal standards, the downstream State would find itself significantly hampered in protecting its own water quality and preventing harmful fluctuations in water quantity.

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4. This is true even for the two States — Michigan and New Jersey — that administer the wetland program under section 404(g) of the Act. *See* 40 C.F.R. §§ 233.70, 233.71. While these States have assumed primary authority for permitting and enforcement, federal agencies retain the right to review and veto permit applications and to bring enforcement actions. The state and federal agencies act as partners, sharing information, resources, and enforcement responsibilities. Loss of jurisdiction under the Act would not only eviscerate state section 404 programs but would leave these States without this federal backstop.

It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect — often the dominant effect — on water quality and quantity. Furthermore, a case-by-case approach would be inherently unpredictable, costly, and immensely burdensome both for public agencies and for property owners needing permits from them. For this reason, in enacting the Clean Water Act, Congress explicitly rejected the case-by-case approach that the Act's predecessor, the Rivers and Harbors Act, had taken.

2. Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act. The Act preempts certain common-law remedies traditionally used to address interstate water pollution, leaving the federal statutory provisions as the primary mechanism for protecting downstream States from the effects of upstream pollution. Curtailing the Act's coverage would also unfairly require States to impose disproportionate limits on in-state sources to offset unregulated upstream discharges.

Coverage of wetlands adjacent to non-navigable tributaries also gives force to a provision of the Act, section 404(g), that allows States to assume administration of the federal program for discharges of fill material into wetlands except for those wetlands that are adjacent to traditional navigable waters. If those were the only wetlands covered by the Clean Water Act, then the statutory provision would be practically meaningless.

3. Respondents' reading of the Clean Water Act does not raise any serious question about the Act's constitutionality under the Commerce Clause. The Act is a necessary and proper

regulation of activity that threatens traditional navigable waters, which are channels of interstate commerce. It likewise properly regulates a class of activity that substantially affects interstate commerce.

ARGUMENT

I. WETLANDS ADJACENT TO TRIBUTARIES OF NAVIGABLE WATERS ARE "WATERS OF THE UNITED STATES" UNDER THE ACT

The core provision of the Clean Water Act — the prohibition of "discharge of any pollutant," including fill material, without a permit, 33 U.S.C. § 1311(a) — applies to discharges into "navigable waters," which the Act defines as the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7), (12)(A). For the last thirty years, the federal agencies charged with implementing the Act have interpreted the phrase "waters of the United States" to include "traditional" navigable waters; all tributaries of those waters, including those that are intermittent and ephemeral; and wetlands "adjacent" to traditional navigable waters or their tributaries.[5] 33 C.F.R. § 328.3(a)(1),(5),(7) (Corps definition); 40 C.F.R. § 230.3(s)(1),(5),(7) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). State agencies and courts have done the same. This longstanding interpretation is correct and should be affirmed.

A. The Experience of the States in Implementing the Act Confirms the Importance of Headwaters to Downstream "Navigable" Waters.

These cases are not about the regulation of hydrologically isolated wetlands, as petitioners suggest. The wetlands at issue in these cases are those that this Court has recognized are

5. The Corps defines intermittent streams as those that have "flowing water during certain times of the year . . .," and ephemeral streams as those with "flowing water only during, and for a short duration after, precipitation events in a typical year." 65 Fed. Reg. 12,818, 12,897-98 (Mar. 9, 2000).

"inseparably bound up" with the open waters to which they are adjacent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Wetlands tend to drain into adjacent waters, either constantly or intermittently, so that discharges into the wetlands are effectively the same as discharges into the waters. *Id.* The Clean Water Act would be eviscerated if it applied only to tributaries of navigable waters and not to the wetlands adjacent to those tributaries.

Coverage under the Act of wetlands adjacent to tributaries is essential because those waters strongly influence the quantity and quality of water entering traditional navigable waters. They retain sediment that otherwise would be transported downstream, where it might block the flow of water or release other pollutants.[6] They also play a major role in the regulation of downstream water chemistry, as, for example, by transforming excess nitrate leaking from septic systems and agricultural fields into harmless gases through the natural process of denitrification.[7] And headwater wetlands also reduce flood peaks

6. *See, e.g.*, Thomas F. Waters, *Sediment in Streams: Sources, Biological Effects and Control* (1995); Cliff R. Hupp & David E. Bazemore, "Spatial and Temporal Aspects of Sediment Deposition in West Tennessee Forested Wetlands," 141 J. Hydrology 179 (1993); Mark R. Walbridge & Judith P. Struthers, "Phosphorus Retention in Non-Tidal Palustrine Forested Wetlands of the Mid-Atlantic Region," 13 Wetlands 84 (1993); Carol A. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," 21 Critical Revs. Envtl. Control 491 (1991).

7. *See, e.g.*, Bruce J. Peterson et al., "Control of Nitrogen Export from Watersheds by Headwater Streams," 292 Sci. 86 (2001) (small headwater stream in Michigan and others elsewhere throughout the United States); Lars O. Hedin et al., "Thermodynamic Constraints on Nitrogen Transformations and Other Biogeochemical Processes at Soil-Stream Interfaces," 79 Ecology 684 (1998) (small Michigan stream); Robert M. Holmes et al., "Denitrification in a Nitrogen-Limited Stream Ecosystem," 33 Biogeochemistry 125 (1996) (small Arizona stream); Peter M. Groffman et al., "Nitrate Dynamics in Riparian Forests: Microbial Studies," 21 J. Envtl. Quality 666 (1992) (small Rhode Island streams).

in navigable rivers and streams by temporarily storing water and gradually releasing it to maintain normal flow.[8]

The States' own studies confirm the importance of tributaries and their adjacent wetlands for downstream water quality. For example, an analysis of Lake Champlain by Vermont and New York concluded that of the estimated 647 metric tons of phosphorus (which tends to deplete dissolved oxygen and thereby create "dead zones" in which most marine life cannot survive) entering the lake from all sources each year, 573 tons — 89% — entered the lake through its tributaries, most of which are non-navigable and intrastate.[9] Similarly, Rhode Island's studies have shown that "small, non-navigable tributary streams [are] important contributors of pollutant loadings in nearly every case." Comments of Jan H. Reitsma, Director, Rhode Island Department of Environmental Management on the ANPRM 2 (Apr. 16, 2003).[10]

The States' studies also confirm that this is an interstate issue, because pollutants discharged in one State may contribute significantly to the impairment of water quality in a traditional navigable water in another State. For example, a study of Long Island Sound by New York and Connecticut found that 13.5% of the estimated 100,436 tons of nitrogen entering the Sound

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8. *See, e.g.*, Mark M. Brinson et al., U.S. Army Corps of Engineers, *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 15, 21, 24, 27 (1995); National Research Council, *Wetlands: Characteristics and Boundaries* 34-5, 40-1 (1995).

9. Vt. Dep't of Envtl. Conservation & N.Y. State Dep't of Envtl. Conservation, *A Phosphorus Budget, Model, and Load Reduction Strategy for Lake Champlain* 95 tbl. 28 (1997), http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_lcdfsfinalreport.pdf.

10. These comments, as well as other States' comments cited in this brief, are available at http://www.asiwpca.org/statecomments.htm.

each year came from headwater tributary watersheds north of Connecticut.[11]

The biological links between headwaters and traditional navigable waters, and the connection between these waters' biological health and their role in interstate commerce, are illustrated by the life cycles of anadromous fish — those that live at sea but spawn in freshwater — such as the pacific salmon and steelhead trout of California and the Northwest and the alewifes of the East Coast. These fish need tributaries with specific water quantity and quality in which to spawn and rear their young. The salmon and trout of the Great Lakes — which as adults live in the lakes but spawn and live as fry in the tributaries— have similar requirements. The presence of these fish in the nation's waterways directly or indirectly supports commercial and recreational activities that generate at least hundreds of millions of dollars of economic activity annually.[12]

Coverage of headwaters is also consistent with the long history of federal regulation in this area. Congress recognized the necessity of regulating tributaries to protect traditional navigable waters under Section 13 of the Rivers and Harbors

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11. N.Y. State Dep't of Envtl. Conservation & Conn. Dep't of Envtl. Prot., *A Total Maximum Daily Load Analysis To Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* 16-18 (Dec. 2000), *available at* http://www.dec.state.ny.us/website/dow/tmdllis.pdf.

12. *See, e.g.*, U.S. EPA, "Great Lakes Strategy 2002 - A Plan for the New Millennium," http://www.epa.gov.glnpo/gls (last visited Jan. 12, 2006) (the annual value of the commercial and sport fishery of the Great Lakes is estimated at over $4.5 billion); U.S. Fish & Wildlife Service & U.S. Census Bureau, *2001 National Survey of Fishing, Hunting, and Wildlife - Associated Recreation* 58, tbl.4 (2002) (33% of Great Lakes recreational fishing targeted salmon or steelhead trout); U.S. Natl Marine Fisheries Service, *Fisheries of the United States 2004* 1-3 (2005) (listing the value of the 2004 commercial harvest for pacific salmon, alewife, striped bass, and bluefish (the last two of which prey on alewifes) at $287 million).

Act of 1899 (sometimes also called the Refuse Act), ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407). Among other things, this provision prohibited certain discharges "into any tributary of any navigable water" and even "on the bank of any tributary of any navigable water." 33 U.S.C. § 407. Congress intended the Clean Water Act's broader language to cover more than the Rivers and Harbors Act did, not less. *See* S. Rep. No. 92-414, at 70 (1971) (explaining that "the Refuse Act authority has significant gaps . . . that render it seriously inadequate as a means of implementation of a water pollution control program"), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736. As Congress stated, the Clean Water Act is meant to continue federal coverage of non-navigable tributaries of traditional navigable waters. *Id.* at 77 (noting that the broad definition of "navigable waters" is intended to include "tributaries thereof"), *reprinted in* 1972 U.S.C.C.A.N. at 3742.

Moreover, the headwaters are vital in their own right. For example, the EPA found that non-navigable tributaries in the mid-Atlantic region contain 558 separate sources of drinking water and serve a population of 5.2 million.[13] Similarly, certain non-navigable bodies of water and wetlands in the New York City Water Supply Watershed have been designated Critical Resource Waters because of their importance in assuring the purity of the city's water.[14]

Non-navigable tributaries comprise at least 75% of the nation's stream and river miles, *see* Judy L. Meyer et al., *Where*

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13. *See* Charles A. Rhodes, Jr., *Findings in the Mid-Atlantic Region Concerning Implications for Clean Water Act Jurisdiction for Various Interpretations of SWANCC*, at 10 (2005), *available at* http://www.aswm.org/calendar/legal/rhodes.pdf.

14. Corps of Engineers, New York District, *Public Notice: Regional Conditions for Nationwide Permits and Designation of Critical Resource Waters*, at 2 (May 21, 2002), *available at* http://www.nan.usace.army.mil/business/buslinks/regulat/pnotices/nwp_pn.pdf.

Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands 6-7 (2003), and it is these tributaries that adjacent wetlands mostly abut. The Delaware Department of Natural Resources and Environmental Control has determined that fewer than 10% of the freshwater wetlands in that State are directly adjacent to traditional navigable waters.[15] Similarly, the Tennessee Wildlife Resources Agency has found that the majority of the State's wetlands are not adjacent to navigable streams.[16] The predominance of non-navigable tributaries and their adjacent wetlands led the federal agencies to reasonably conclude that they are covered by the Act, which this Court has repeatedly characterized as comprehensive, *e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981), and has described as covering "virtually all surface water in the country," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486, 492 (1987). *See* 33 C.F.R. § 328.3(a)(1),(5),(7) (Corps definition); 40 C.F.R. § 230.3(s)(1),(5),(7) (EPA definition).

The contrasting interpretation of the Act urged by Amici American Petroleum Institute ("API") and National Association of Homebuilders ("Homebuilders") has nothing to recommend it. They argue that decades-old drainage ditches, such as the county drainages next to the Carabell wetland, and other non-navigable tributaries that drain several or many areas ought to be regarded not as tributaries but as "point sources"— *i.e.*, original sources of discharges — that require permits under the Act. Homebuilders Br. at 2-12; API Br. at 16-18.[17] If true,

15. Comments of the Delaware Department of Natural Resources and Environmental Control (Apr. 16, 2003), at 2.

16. Comments of the Tennessee Wildlife Resources Agency on the ANPRM (Feb. 26, 2003), at 2.

17. Homebuilders mistakenly claims that the Sutherland-Oemig drain at issue in *Carabell* is treated as a point source rather than a tributary under the relevant permit. Homebuilders Br. at 8-9. In fact, the permit authorizes the discharge of storm water *to* the drain, which indicates that the drain is being treated as a tributary, not a point source. Homebuilders Br. at App. 3b, 6b.

whenever a tributary merges with another stream it could be called a discharge point. But such a reading has no support in the structure of the Act, which aims to control pollution at its source rather than permitting pollutants to enter the water and dealing with them at some downstream location. *See* S. Rep. No. 92-414, at 77 (1972) ("[I]t is essential that discharge of pollutants be controlled at the source."). That reading of the statute would also impose enormous new burdens on landowners who do not add pollution to water but happen to own the site at which a tributary flows into navigable water, and who would have to obtain a permit for every single drainage ditch and non-navigable tributary.[18]

B. Requiring a Case-by-Case Determination of a Significant Effect for Each Wetland Would Undermine State and Federal Efforts to Control Water Pollution.

Perhaps recognizing the importance of wetlands adjacent to headwater tributaries, some of petitioners' amici (including the States of Alaska and Utah) argue that the Act can be invoked only after a case-by-case assessment of whether any particular wetland "significantly affect[s]" the flow or condition of a traditional navigable waterway. Alaska Br. at 10. This

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18. Moreover, since many state laws do not distinguish between man-made drains and natural streams, treating them differently under federal law would unnecessarily complicate the administration of state programs. *See, e.g.*, Mich. Comp. Laws. § 324.30101(f) (defining "[i]nland lake or stream" to include "a river, stream, or creek which may or may not be serving as a drain" and "any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water"); *id.* § 324.3101(g) (defining "[w]aters of the state" as "groundwaters, lakes, rivers, and streams and all other watercourses and waters . . . within the jurisdiction of this state"); N.Y. Environmental Conservation Law § 17-0105(2) (defining "waters of the state" to include natural or artificial water bodies); S.C. Code Ann. § 48-1-10(2) (same).

unworkable proposal is contrary to the history and structure of the Act.

Requiring wetland-by-wetland analysis would make administration of the Clean Water Act cumbersome and wildly unpredictable.[19] Without extensive studies, it is often unclear whether a particular wetland "significantly affects" traditional navigable waters, and thus whether state or federal authorities have jurisdiction. Property owners would be uncertain whether they need a permit and, if so, from which agency they could obtain one. And because discharges often have significant downstream effects only in the aggregate, a wetland-specific analysis will be largely meaningless.

That is why Congress in the Clean Water Act squarely rejected the effects-based approach of earlier federal water-pollution-control laws that were widely regarded as having failed. *See, e.g.*, *EPA v. California*, 426 U.S. 200, 202-06 (1976) (discussing the categorical approach to controlling water pollution adopted in the 1972 amendments in contrast to the ambient water-quality-based discharge-by-discharge approach taken by the Federal Water Pollution Control Act before 1972); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042-43 (D.C. Cir. 1978) (discussing the scientific and administrative difficulties of tying water pollution controls to discharge-by-discharge effects). This Court likewise rejected a wetland-by-wetland approach to Clean Water Act jurisdiction, noting that while "it may well be that not every adjacent wetland is of great

19. *See* Comments of David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Resources Commission on the ANPRM 5 (Apr. 15, 2003) ("Without this type of presumptive foundation for jurisdiction, a wetland-by wetland demonstration of hydrologic relationships would make enforcement of the [Act] impossible."); Comments of Jeffrey R. Vonk, Director, Iowa Department of Natural Resources on the ANPRM (Mar. 31, 2003), at 3 ("The burden of requiring regulatory agencies to make wetland by wetland determinations based on physical linkages to streams is unreasonable and will make CWA regulation ineffective.").

importance to the environment of adjoining bodies of water," the Corps nonetheless properly asserted jurisdiction over all such wetlands since they often have a significant effect on adjacent bodies of open water. *Riverside Bayview*, 474 U.S. at 135 n.9. As the Court explained, if a particular wetland turns out not to be important to the adjacent waterway, "the Corps may always allow development of the wetland for other uses simply by issuing a permit." *Id.*

The same is true here: If a wetland adjacent to a non-navigable tributary in fact has little ecological value and discharges into it are unlikely to affect downstream waters, the appropriate agency may permit the discharges. But the proper place for this inquiry is as part of the decision whether to issue a particular permit, not the decision whether the wetland is covered by the statute in the first place. *See* 33 U.S.C. § 1344(e)(1) (authorizing dredge and fill discharge permits on a state, regional, or nationwide basis for activities that alone and cumulatively have only minimal adverse effect on the environment).

Nothing in this Court's decision in *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), requires a wetland-by-wetland analysis of connection to traditional navigable water to determine jurisdiction under the Act. *SWANCC* merely held that the Act does not cover non-navigable, intrastate waters just because those waters are used by migratory birds. 531 U.S. at 162, 174. But flooded mine pits whose sole connection to traditional navigable waters is their use by migratory birds are a far cry from wetlands that are adjacent to tributaries flowing into traditional navigable waters. As a general matter, these wetlands affect the quantity, quality, and biological integrity of downstream traditional navigable waters, and for that reason are squarely covered by the Act without the need for a wetland-by-wetland analysis. *See Riverside Bayview*, 474 U.S. at 135 n.9 ("If it is reasonable for

the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand."); *see also Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (noting that general rules "tend to provide guidance" and "minimize the burdens on litigants and the judicial system").

II. COVERAGE OF WETLANDS ADJACENT TO TRIBUTARIES IS NECESSARY TO MAINTAIN THE RESPECTIVE ROLES ASSIGNED BY THE ACT TO THE FEDERAL AND STATE GOVERNMENTS

Construing the Clean Water Act as narrowly as petitioners and amici urge would deprive the Act of the broad coverage that Congress intended. The nation's system of waters, though broad in geographic scope, is highly interconnected. Pollutants discharged into the Mississippi River in Minnesota can affect the waters of nine downstream States as far away as the Gulf of Mexico. *See Ouellette*, 479 U.S. at 497 n.17; *see also Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (considering the effect of effluent discharged into an unnamed tributary in Arkansas connected through a series of three creeks before entering the Illinois River, 22 miles upstream of the Arkansas-Oklahoma border).

While the Act gave downstream States "a strong voice in regulating their own pollution," it provided them with only an advisory role in regulating pollution that originates outside their borders. *Ouellette*, 479 U.S. at 490. A State may not establish a separate permit system to regulate out-of-state sources. *Id.* at 491. And this Court has held that the Act's comprehensive regulation of upstream sources preempts traditional common-law remedies that downstream States might otherwise have for upstream sources of pollution. *See City of Milwaukee*, 451 U.S. at 317 (federal common law preempted); *Ouellette*, 479 U.S. at 494 (common law of an affected State preempted). The Court's preemption decisions reflect the fact that the Clean Water Act's core provisions are the primary

bulwark protecting downstream States from upstream water pollution. Given the Clean Water Act's focus on controlling pollution at its source, *see* 33 U.S.C. § 1251(a), the broad geographic interconnection among waters, and the limited power of downstream States to control pollution sources in upstream states, the Act must be construed to protect waters in downstream states by "expansively . . . cover[ing] waters that are not navigable in the traditional sense," *Ouellette*, 479 U.S. at 486 n.6, but that are hydrologically connected with downstream waters, even if only occasionally.

Petitioners' narrow view of the Act, which excluded these waters from federal regulation, would unavoidably impose additional, unnecessary burdens on downstream States and their citizens. Each such State, when dealing with waters within state boundaries that fail water quality standards mandated by the Clean Water Act, would be forced to impose disproportionate limits on in-state sources to offset pollution from out-of-state sources that the State cannot regulate.[20] This could produce unfair differences not only between dischargers in different States but also between dischargers in different areas of a single State, since those areas downstream of other States might have to be regulated more strictly than other areas — all contrary to the primacy of evenhanded discharge standards under the Act. *See* Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation*, 23-24 (2d ed. 2002) (standards based on the quality of receiving water are relegated to a backup role where technology-based standards are insufficient).

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20. *See* Comments of Larry D. McKinney, Senior Director, Aquatic Resources, Texas Parks and Wildlife Department on the ANPRM 7 (Apr. 15, 2003) (limiting Clean Water Act coverage to traditional navigable waters "would most likely result in more restrictive discharge permit limits to those discharging into the navigable waters to compensate for those dischargers who would no longer be required to meet standards set by" the Act); Comments of Lori F. Kaplan, Commissioner, Indiana Department of Environmental Management 11 (April 16, 2003) (same).

Additionally, over the last thirty years, the States have relied on broad Clean Water Act coverage to protect the health of their citizens and environments. Indeed, federal and state agencies for over 100 years have recognized federal jurisdiction over non-navigable tributaries. *See* Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407) (prohibiting certain discharges into tributaries of navigable waters or onto their banks). Many States rely on the Act as the sole source of legal protection for adjacent wetlands. Other States rely in part on the federal law and resources, augmenting them with state laws and resources, including in some instances state water-pollution-control laws.[21] If federal jurisdiction under the Clean Water Act were restricted as petitioners propose, many States will have to develop new regulatory programs to fill the void. At a minimum, this would take time and money, and even when operational, the substitute for the federal program would be a messy patchwork of conflicting regulatory requirements among the States.

Reading the Clean Water Act as covering wetlands adjacent to non-navigable tributaries also is necessary to give meaning to a provision of the Act that retains federal authority over wetlands adjacent to traditional navigable waters while yielding authority to the States to regulate discharges to other waters. In 1977, after the EPA and the Corps had adopted regulations establishing the Act's coverage of wetlands adjacent to tributaries, Congress amended the Act to authorize States to assume administration of the federal section 404 permit program through their own permit programs. 33 U.S.C. § 1344(g)(1) (section 404(g)(1) of the Act). Practically speaking, the vast majority of permits issued under these programs concern wetlands rather than open waters. The 1977 amendments reflect

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21. Only twenty states have specific wetland protection statutes. They are Connecticut, Florida, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin.

Congress's decision not to remove wetlands adjacent to tributaries from the Act's coverage, but instead to provide additional procedures to reduce the regulatory burden on the Corps, and to give States a greater role in implementing the wetlands program if they want one. *See Riverside Bayview*, 474 U.S. at 135-39 (discussing the focus on wetlands in the 1977 amendments); *see also* Lance D. Wood, "Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands," 34 Envtl. L. Rep. 10,187, 10,214-15 (2004) (discussing the 1977 amendments to section 404).

Under this provision, however, the States may not administer the section 404 program for "traditional" navigable waters, waters that could be improved to sustain navigation, and "wetlands adjacent" to those waters. *See* 33 U.S.C. § 1344(g)(1).[22] This means two things. First, this section clearly contemplates coverage of wetlands and improvable tributaries, not just traditional navigable waters. Second, if the Act covered only wetlands adjacent to traditional navigable waters, as Petitioners contend, this statutory provision would be practically meaningless, since there would be no wetlands covered by the Act over which States could assume permitting authority. When Congress amends a statute, though, the Court "presume[s] it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Moskal v. United States*, 498 U.S. 103, 109-111 (1990) (Court must consu[illegible] a

22. In Michigan's case, after approval of its program the State entered into a Memorandum of Understanding with the Corps that defined the extent of traditional navigable waters. The Corps estimates that less than 500 miles of Michigan's approximately 54,000 miles of river and streams are "traditional" navigable waters. *See* Memorandum from Diana Klemans, Chief, Surface Water Assessment Section, Water Bureau, Mich. Dep't of Envtl. Quality, to S. Peter Manning, Dep't of Attorney General (Jan. 10, 2006), *available at* http://www.deq.state.mi.us/documents/deqexeissuestowatchRapanosmemo2006.pdf.

statute to give effect, if possible, to every provision). The natural conclusion is that the Clean Water Act covers wetlands adjacent to non-navigable tributaries, and that Congress intended to create a process under which the States can assume primary responsibility for fill operations in these wetlands.

Finally, and contrary to the unsupported assertions of the *Rapanos* petitioners and some of their amici, applying the Act to wetlands adjacent to non-navigable tributaries does not unduly intrude on the traditional and primary power of States and their municipal subdivisions over land and water use. Brief for Petitioners in No. 04-1034 at 28-31; Brief of Amici Curiae Foundation for Environmental and Economic Progress, et. al., at 14-19. This argument, which is advanced mostly by the leading commercial interests whose activities are subject to regulation under the Act rather than by States or municipalities themselves, fails to show that a handful of permit denials by the Corps constitutes a significant conflict. The argument also fails to recognize the benefits that a consistent national program provides to the States. Congress has given the States a major role in implementing the Act's programs and goals, and has left the States and their subdivisions ample room to exercise control over land and water use. At the same time, however, Congress learned from experience that only a comprehensive approach to water-pollution regulation at the federal level can achieve the Nation's hopes for clean water.

III. FEDERAL POWER OVER INTERSTATE COMMERCE INCLUDES THE POWER TO REGULATE DISCHARGES INTO WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES

Construing the Clean Water Act to cover wetlands adjacent to non-navigable tributaries does not raise any serious — or even close — constitutional questions. To the contrary, the Clean Water Act falls comfortably within the federal commerce power. U.S. Const. art. I, § 8. Under this provision and the Constitution's "necessary and proper" clause, the federal government may

regulate purely intrastate activities that threaten the use of a channel of interstate commerce or a class of activities that in the aggregate substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995); *see also Gonzalez v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring) "([T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce.") The Clean Water Act can be upheld under both of these categories. More importantly, the constitutional question is not a close call. There is thus no need for this Court to adopt a limiting construction of the Clean Water Act under the canon of constitutional avoidance. *See Harris v. United States*, 536 U.S. 545, 555 (2002) (explaining that the canon applies "only when there are serious concerns about the statute's constitutionality").

Because traditional navigable waters are an important channel of interstate commerce, the Commerce Clause encompasses "such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States." including legislation that "requir[es] the removal of obstructions to their use." *The Daniel Ball*, 77 U.S. 557, 564 (1871). Moreover, as noted above, many waters that are not "traditionally" navigable are navigable in fact by recreational vessels, which themselves engage in an important activity in interstate commerce. The Commerce Clause also allows the federal government to regulate activities *outside* of the traditional navigable waters — for example, in non-navigable tributaries — that potentially threaten navigation *within* those waters. *See United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960); *United States v. Rio Grande Dam & Irrigation Co.*, 174

U.S. 690, 709-10 (1899); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) ("There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries."). As explained above, discharges into wetlands adjacent to non-navigable tributaries may impair navigation in a number of ways: by causing flooding downstream, by allowing silt to run off and accumulate in a downstream waterway, or (if the discharge contains toxic chemicals that flow downstream) by making use of the waterway dangerous. The federal government rationally may conclude that pollution discharged into these wetlands substantially affects downstream traditional navigable waters.

Nor is federal authority under the Commerce Clause limited by any requirement that the Clean Water Act cover only those specific discharges that by themselves can be proven to substantially affect traditional navigable waters. Even when the chances that any particular discharge will reach a traditional navigable water are low, it is overwhelmingly likely that some of the pollutants discharged into wetlands adjacent to headwater tributaries will be swept downstream into traditional navigable waters, and collectively even a small percentage of all discharges can impair navigability. An inability to control discharges into non-navigable tributaries and adjacent wetlands would thus leave the Clean Water Act with a "gaping hole." *Raich*, 125 S. Ct. at 2209.

The Clean Water Act is also constitutional as regulation of a class of economic activity that in the aggregate substantially affects interstate commerce. Petitioners and their amici do not seriously dispute that the activities regulated by the Clean Water Act, in the aggregate, substantially affect interstate commerce. The polluting activities that are regulated by the Clean Water Act are economic in nature. Point-source discharges are a means to dispose of waste, which is the kind of commercial activity that is subject to regulation under the Commerce Clause.

See, e.g., Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 340 n.3 (1992) (noting that solid waste, even if it has no value, is an "article of commerce"). More specifically, discharging fill material into a wetland — the precise activity that is at issue in these cases — is almost always done for economic reasons. This activity, which literally creates land that can be developed where none was before, is inherently "economic." *See Raich*, 125 S. Ct. at 2211 (noting that "economics" means "the production, distribution, and consumption of commodities" (emphasis added) (quotation marks and citations omitted)). The activity also has direct economic effect in terms of downstream flooding and water-quality impairment. Tellingly, virtually every reported decision involving the discharge of fill material, including both *Rapanos* and *Carabell* themselves, has involved large-scale commercial development — construction of a residential subdivision, an industrial building, or public works.[23]

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23. *See, e.g., SWANCC*, 531 U.S. at 163 (construction of a disposal site for baled nonhazardous solid waste); *Riverside Bayview*, 474 U.S. at 124 (construction of residential housing development); *Baccarat Fremont Developers, LLC v. U.S. Army Corp of Eng'rs*, 425 F.3d 1150, 1152 (9th Cir. 2005) (construction of a sixbuilding office, research, and manufacturing facility); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005) (construction of an "upscale gated residential community" containing 794 single-family houses); *United States v. Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (construction of residential housing development); *Mich. Peat v. U.S. EPA*, 175 F.3d 422, 425 (6th Cir. 1999) (peat mining); *Hill v. Boy*, 144 F.3d 1446, 1448 (11th Cir. 1998) (construction of earthen dam and 650 acre reservoir); *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (construction of planned unit development project serving 80,000 residents); *United States v. Brace*, 41 F.3d 117, 120 (3d Cir. 1994) (commercial farming operation); *Hoffman Homes, Inc. v. U.S. EPA*, 999 F.2d 256, 257-58 (7th Cir. 1993) (residential subdivision); *United States v. Pozsgai*, 999 F.2d 719, 722 (3d Cir. 1993) (construction of commercial truck repair garage); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 42 (D.C. Cir. 1987) (construction of hydroelectric facility); *Friends of the Earth v. Hintz*, 800 F.2d 822, 824 (9th Cir. 1986) (sawmill logging complex).

That economic aspect sets this case apart from *Lopez* and *Morrison*, the only recent cases striking down federal legislation on Commerce Clause grounds. The regulated activities in those cases — possession of a gun in a school zone and gender-motivated violence — were in no way economic in at least the vast majority of circumstances. *See Lopez*, 514 U.S. at 561; *United States v. Morrison*, 529 U.S. 598, 613 (2000). Whatever motives someone might have for wandering by a school while carrying a gun or for committing a brutal act of violence against a fellow human being, those motives are unlikely to include profit. Nor are the activities at issue in *Lopez* and *Morrison* closely associated with any traditional economic activities like manufacturing or construction. The polluting activities covered by the Clean Water Act, by contrast, are almost always directly tied to traditional economic activity. They are undertaken precisely because of the value that they provide, either by saving on the costs of storage and disposal or by enabling new uses of property. They thus fall within the core of activities that can be regulated under the Commerce Clause.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

MICHAEL A. COX
Attorney General of the State of Michigan
THOMAS L. CASEY
Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
PETER H. LEHNER
Chief, Environmental Protection Bureau
DANIEL SMIRLOCK
Deputy Solicitor General
BENJAMIN N. GUTMAN
Assistant Solicitor General
LEMUEL M. SROLOVIC
Assistant Attorney General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Amici Curiae

TERRY GODDARD
Attorney General State of Arizona
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-4266

MIKE BEEBE
Attorney General of Arkansas
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-20007

BILL LOCKYER
Attorney General State of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244
(916) 323-1996

RICHARD BLUMENTHAL
Attorney General of Connecticut
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
(860) 808-5250

CARL C. DANBERG
Attorney General State of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

CHARLES J. CRIST, JR.
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

MARK J. BENNETT
Attorney General of Hawaii
425 Queen St.
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601
(312) 814-3000

THOMAS J. MILLER
Iowa Attorney General
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-8373

GREGORY D. STUMBO
Attorney General Commonwealth of Kentucky
Suite 118
Capitol Building
700 Capitol Ave.
Frankfort, KY 40601
(502) 696-5300

CHARLES C. FOTI, JR.
Attorney General
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6705

G. STEVEN ROWE
Attorney General
State of Maine
Six State House Station
Augusta, ME 04333-0006
(207) 626-8599

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6300

THOMAS F. REILLY
Attorney General of
Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MIKE HATCH
Attorney General
of Minnesota
102 State Capitol
St. Paul, MN 55155-1002
(651) 297-4272

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39201
(601) 359-3680

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

MIKE MCGRATH
Attorney General of
Montana
P.O. Box 201401
Helena, MT 50620
(406) 444-2026

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-3658

PETER C. HARVEY
Attorney General of
New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625
(609) 292-8576

PATRICIA A. MADRID
Attorney General of
New Mexico
P.O. Drawer 1508
Sante Fe, NM 87504
(505) 827-6000

ROY COOPER
Attorney General of
North Carolina
North Carolina Department
of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6400

JIM PETRO
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215
(614) 466-8980

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105
(405) 521-3921

HARDY MYERS
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503) 378-6002

PATRICK LYNCH
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

HENRY MCMASTER
Attorney General of
South Carolina
Robert C. Dennis Office Bldg.
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

PAUL G. SUMMERS
Attorney General of the
State of Tennessee
P. O. Box 20207
Nashville, TN 37202
(615) 741-3491

WILLIAM H. SORRELL
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3173

ROB MCKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504
(360) 753-6245

PEGGY A. LAUTENSCHLAGER
Attorney General of Wisconsin
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
(608) 266-1221

ROBERT J. SPAGNOLETTI
Attorney General for the
District of Columbia
Wilson Building
1350 Pennsylvania Ave., NW
Washington, DC 20004
(202) 727-3400

SUSAN SHINKMAN
Chief Counsel
MARGARET O. MURPHY
Assistant Counsel
Pennsylvania Department of
Environmental Protection
400 Market Street
Harrisburg, PA 17101
(717) 787-6853

M. CAROL BAMBERY
Association Counsel
International Association of Fish
and Wildlife Agencies
444 N. Capitol Street, NW
Suite 725
Washington, DC 20001
(202) 624-3687

APPENDIX

Navigable Water Within Each Continental U.S. State With a Portion of the River or Lake in One or More Other States[1]

State	Navigable Water	States with Upstream or Border Portions	Notes
AL	Chattahoochee River	GA	1
AZ	Colorado River	CO, UT, NV, CA	1
AR	Arkansas River	CO, KS, OK	1
CA	Colorado River	CO, UT, AZ, NV	1
CO	Navajo Reservoir (San Juan River)	NM	2,3
CT	Connecticut River	NH, MA, VT	1
DC	Potomac River	WV, VA, MD	1
DE	Delaware River	NY, PA, NJ	1
FL	Apalachicola River	GA	1
GA	Savannah River	SC	1
ID	Snake River	WY, OR, WA	1
IL	Lake Michigan	MI, WI, IN	1

[1]This table lists only one water body for each State, although most States have many such water bodies. For purposes of this appendix, the District of Columbia is treated as a State.

State	Navigable Water	States with Upstream or Border Portions	Notes
IN	Lake Michigan	MI, WI, IL	1
IA	Missouri River	MT, ND, SD, NE	1
KS	Missouri River	MT, ND, SD, NE, IA, MO	1
KY	Mississippi River	MN, WI, IA, IL, MO, TN	1
LA	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, MS	1
ME	Piscataqua River	NH	1
MD	Potomac River	WV, VA, DC	1
MA	Connecticut River	NH, VT	1
MI	Lake Michigan	IN, WI, IL	1
MN	Mississippi River	WI	1
MS	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, LA	1
MO	Missouri River	MT, ND, SD, NE, IA, KS	1
MT	Yellowstone River	WY	1
NE	Missouri River	MT, ND, SD, IA, MO	1

State	Navigable Water	States with Upstream or Border Portions	Notes
NV	Colorado River	CO, UT, AZ	2
NH	Piscataqua River	ME	1
NJ	Delaware River	NY, PA, DE	1
NM	Navajo Reservoir (San Juan River)	CO	2,3
NY	Delaware River	PA	1
NC	Roanoke River	VA	1
ND	Missouri River	MT	1
OH	Ohio River	PA, WV, KY	1
OK	Arkansas River	CO, KS	1
OR	Snake River	WY, ID	1
PA	Delaware River	NY, NJ	1
RI	Mount Hope Bay	MA	1
SC	Savannah River	GA	1
SD	Missouri River	MT, ND, NE	1
TN	Mississippi River	MN, WI, IA, IL, MO, KY, AR	1
TX	Rio Grande	CO, NM	1
UT	Green River	WY, CO	2,4

State	Navigable Water	States with Upstream or Border Portions	Notes
VT	Lake Champlain	NY	5
VA	Potomac River	WV, MD, DC	1
WA	Columbia River	OR	1
WV	Ohio River	PA, OH	1
WI	Mississippi River	MN, IA	1
WY	Green River (Flaming Gorge Reservoir)	UT	2

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1. U.S. Army Corps of Engineers, *Bridges Over the Navigable Waters of the United States* (1961).

2. *Comments of the Western Water Alliance to the U.S. Environmental Protection Agency*, Docket ID OW-2002-0050, April 16, 2003.

3. *Wreyford v. Arnold*, 477 P.2d 332 (N.M. 1970).

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IN THE

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JOHN A. RAPANOS, *et ux.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF PULTE HOMES, INC., CENTEX HOMES, HOVNANIAN ENTERPRISES, INC., KB HOME, LENNAR CORPORATION AND M.D.C. HOLDINGS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
STEPHEN M. NICKELSBURG
ILEANA M. CIOBANU
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

December 2, 2005

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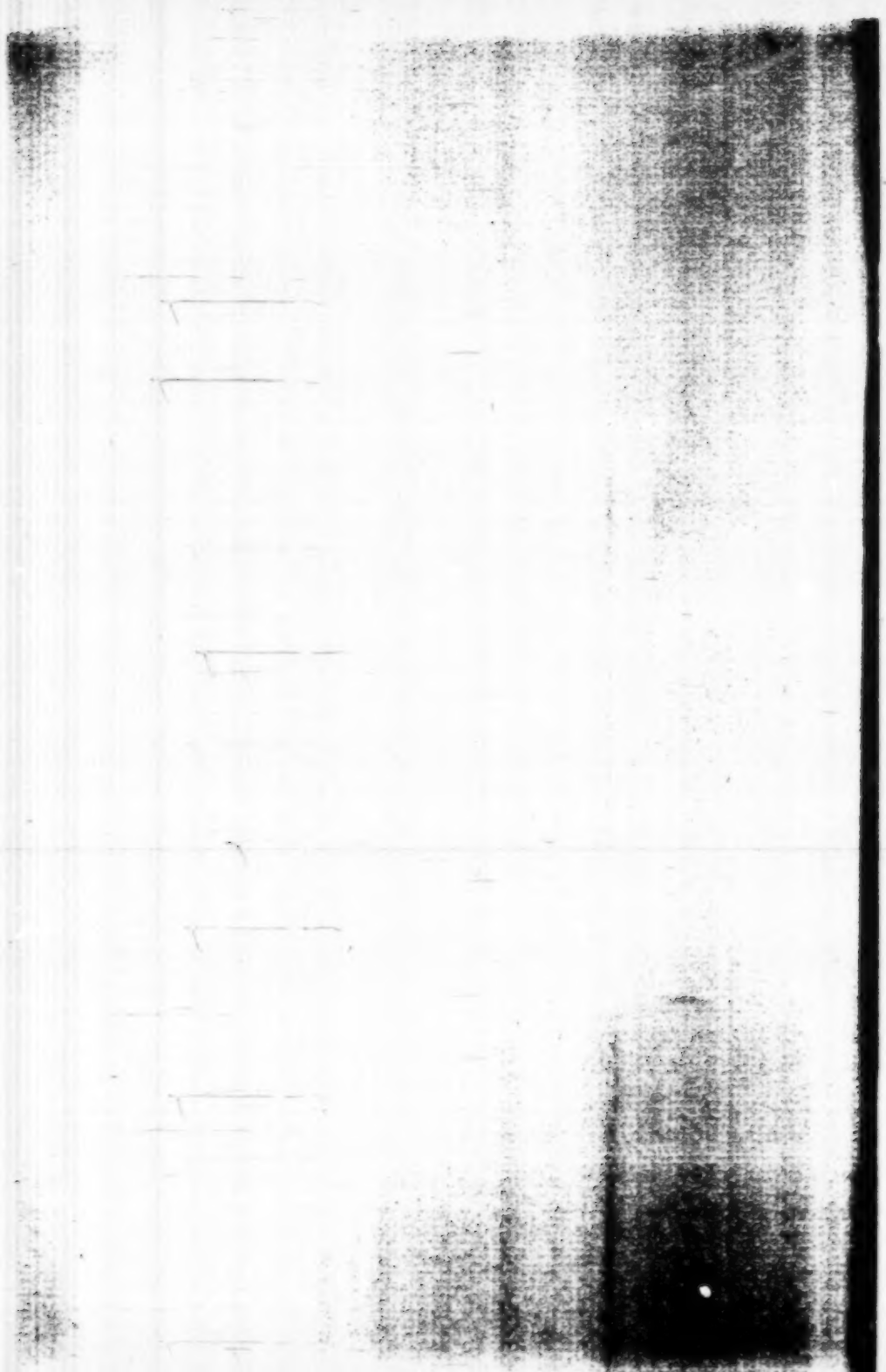

QUESTIONS PRESENTED

1. Whether the Clean Water Act's prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable wetlands that do not abut a navigable water.

2. Whether the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote, exceeds Congress' constitutional power to regulate commerce among the States.

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INTEREST OF *AMICI CURIAE*[1]

Amici Pulte Homes, Inc., Centex Homes, Hovnanian Enterprises, Inc., KB Home, Lennar Corporation, and M.D.C. Holdings, Inc. are among the ten largest publicly-traded residential homebuilders in the nation. *Amici* engage in residential construction and development on all scales, including the design of individual homes and the development of large-scale residential communities. In the year 2005 alone, *amici* together will sell more than 175,000 homes in 34 States and will employ over 58,000 workers.

Under the Clean Water Act ("CWA" or the "Act"), if *amici* engage in activities involving the movement of earth in federal "navigable waters"—rather than on land or in the waters of the States—they must first obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). See 33 U.S.C. § 1344(a). Of course, nearly every construction project requires some degree of earthmoving. Accordingly, *amici* have a substantial interest in the establishment of proper and predictable boundaries to federal geographic jurisdiction under the CWA.

Amici are deeply concerned by the Government's claim that a mere "surface hydrological connection" to a down-gradient navigable water converts an inland geographic area into a "water of the United States." See Rapanos Opp. (I). Because all water flows downhill, the Government's position would federalize unlimited expanses of the national landscape. Indeed, in the cases under review, the Sixth Circuit approved agency determinations that upland ditches far afield from any traditional navigable water are "waters of the United States." See *Carabell* v. *United States Army Corps of Eng'rs*, 391

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici* made any monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk.

F.3d 704, 705-06 (6th Cir. 2004) (authorizing jurisdiction over property next to an unnamed ditch that connects with an unnamed drain that in turn empties into Auvase Creek, which "eventually connects" with Lake St. Clair); *United States* v. *Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004) (authorizing jurisdiction over wetland property next to a drain, which in turn connects to a creek, which in turn connects with a navigable river several miles away).

These far-reaching agency assertions of federal geographic jurisdiction are not unusual. They are not even the most extreme examples. By claiming that "tributaries" to navigable waters include upstream connections of the first, second and third order and beyond—including ditches, "intermittent streams" and "ephemeral streams" that only occasionally carry water—the Corps has characterized even arid desert areas as navigable waters of the United States. In one example in the western United States, the Corps asserted jurisdiction over an arid "desert wash" based on its "connection," through a 100-mile series of down-gradient washes and other tributaries, to the Colorado River, the only truly navigable water in Arizona.[2] In another example, the Corps required *amicus* Pulte Homes to endure a three-year permitting process for a town-approved residential community located 200 miles and three orders of "tributaries" away from that same river.

The practical effects of this broad claim of federal geographic jurisdiction are substantial. Once EPA or the Corps characterizes an upstream area as a "water of the United States," the agencies assert plenary jurisdiction over virtually every activity that takes place there, even if those activities would never cause a discharge to a downstream navigable water. In particular, before *amici* can move earth in an upstream "wetland," they must negotiate the Corps' complex

[2] *See Approved Jurisdictional Determination for the Sunrise Office Park*, No. 2001-00379-RJD, slip op. at 2-4 (U.S.A.C.E. Sept. 7, 2001) (administrative appeal decision), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AppealsTable.html.

permitting process, which includes a general "public interest" review rivaling that of any local planning board. According to one study, this process takes an average of 788 days to complete, at an average cost of over $270,000.[3] The Corps scrutinizes every aspect of an applicant's project in its review, and frequently requires extensive design changes and exacts costly "mitigation" projects and concessions as a condition of issuing a purportedly simple "discharge permit."

In short, the Government's position would extend federal regulatory authority far beyond the letter and intent of the CWA into the realm of state and local authority over land and water use, doing substantial harm to our system of federalism and at substantial practical cost to *amici* and countless others in their industry. This position is inconsistent with the CWA and with this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). It should be rejected; and the decisions below should be reversed.

SUMMARY OF ARGUMENT

The plain language of the CWA does not authorize the Corps to exercise geographic jurisdiction over an upland area merely because the area has a remote "hydrologic connection" to a navigable water. The CWA prohibits the discharge of pollutants into identifiable bodies of water: the "navigable waters," defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311, 1362(7). In invoking the "navigable waters" and the "waters of the United States," Congress employed terms of art that had been well-established in this Court's case law and in congressional legislation for centuries. See, *e.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); 33 U.S.C. § 403. Thus, the plain language of the CWA demonstrates Congress' intent to exercise

[3] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (2002).

its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. The Corps originally so interpreted the CWA in 1974, and this Court has held that this original interpretation correctly captured the intent of Congress. *Id.* at 168 (citing 33 C.F.R. § 209.120(d)(1) (1974)).

Because of the recognized difficulty of determining the boundaries of navigable water bodies, this Court has held that the Corps has the discretion to include within its jurisdiction wetlands directly abutting and "'inseparably bound up with the 'waters' of the United States.'" *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1984). But ambiguity regarding the demarcation of the metes and bounds of the "waters of the United States" does not alter the CWA's core limitation to identifiable navigable waters. The Government's "hydrological connection" theory, by contrast, would eliminate the distinction between the waters of the United States and the waters of the States.

The plain language of the CWA thus does not permit the Government's unlimited assertion of federal regulatory jurisdiction over practically every wetland and stream in the United States. Indeed, because the Government's interpretation pushes "the outer limits of Congress' power" and impinges on the States' traditional authority over land and water use, it cannot be sustained absent a clear statement by Congress. *SWANCC*, 531 U.S. at 172-74. No clear congressional statement authorizes the massive expansion of federal authority the Government asserts here. In fact, the Government's theories do not meet the basic prerequisites for judicial deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Finally, the Government's expansive definition of the "waters of the United States" is unnecessary to protect the Nation's navigable waters from upstream polluting activities. The CWA is far more naturally read to allow the agencies to regulate upstream *activities* that pollute federal waters than to

federalize upland *areas* that heretofore had been the exclusive domain of the States. As a matter of statutory language, the CWA grants the agencies authority to regulate "discharges" to the navigable waters, including "any addition of any pollutant to navigable waters." 33 U.S.C. §§ 1311, 1362(12). Thus, the agencies may regulate upstream discharges of pollutants to navigable waters, whether the pollutants reach the waters directly or through intervening conveyances. Moreover, as a matter of scientific necessity, the agencies have failed to explain how the upland deposit in the instant cases of "fill material"—generally consisting of rock, sand and gravel—risks transmitting that material to downstream "waters of the United States."

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CWA CREATES FEDERAL GEOGRAPHIC JURISDICTION OVER SPECIFIC, IDENTIFIABLE BODIES OF WATER: THE "NAVIGABLE" "WATERS OF THE UNITED STATES."

"It is axiomatic that the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (internal quotations and alteration omitted). The plain language of the CWA bars the Government's sweeping assertion of jurisdiction here.

The CWA prohibits "the discharge of any pollutant by any person," except in accordance with a discharge permit. 33 U.S.C. § 1311(a). The "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Act further defines the "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The CWA thus does not grant plenary jurisdiction over all the water in the Nation. To the contrary, the CWA grants ju-

risdiction only over specific "waters." *Id.* § 1362(7), (12).[4] The statutory touchstone for distinguishing jurisdictional "waters of the United States" from non-jurisdictional waters of the States is navigability. See *id.* § 1362(12). As this Court has observed, Congress' use of "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172.

This statutory language is "clear." *Id.* The terms "navigable waters" and "waters of the United States" are well-established terms of art developed through two centuries of case law and legislation, and Congress' use of these terms in the CWA confirms its intent to invoke its traditional jurisdiction over the navigable waters. Federal authority over the waters of the United States has long been understood to stem from the Commerce power over navigation. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). For the same reason, the concept of "navigability" has long been understood to define the geographic scope of federal authority. See, *e.g.*, *The Daniel Ball*, 77 U.S. at 563.

As originally understood in this Court's case law, the "navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States," are those that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes

[4] *See Oxford English Dictionary* (2005) (defining "water" as a "[a] body of water on the surface of the earth"), *available at* http://dictionary.oed.com; *The American Heritage College Dictionary* 1524 (3d ed. 1997) (defining "water" as "[a] body of water such as a sea, lake, river, or stream"); *Webster's Third New International Dictionary of the English Language Unabridged* 2581 (Philip Babcock Gove et al. eds., 1993) (defining "water" as "a quantity or depth of water adequate for some purpose (as navigation)").

in which such commerce is conducted by water." *Id.* at 563. The distinction between the "navigable waters of the United States" and the "waters of the States" thus is based on "whether the stream in its ordinary condition affords a channel for useful commerce" among the States. *United States* v. *Donnelly*, 228 U.S. 243, 262 (1913). This Court has broadened the definition of "navigable waters" to include waters that were navigable in the past or through reasonable improvements could be made navigable in the future. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921). But the bedrock proposition that "[t]he states possess control of the waters within their borders" has not changed. *Appalachian Elec. Power Co.*, 311 U.S. at 405.

Congress has long respected the fundamental distinction between the navigable waters of the United States and the waters of the States. For example, in the Rivers and Harbors Act of 1890 ("RHA"), Congress prohibited the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the *waters of the United States*," or to "excavate or fill, or in any manner to alter . . . the course . . . or capacity of . . . the channel of any *navigable water of the United States*," without authorization from the predecessor to the Corps of Engineers. 33 U.S.C. § 403 (emphases added). The activities regulated by these two clauses of the RHA require different levels of authorization (congressional authorization for the complete obstruction of navigable waters, versus agency authorization for dredging, filling, or altering the channels of navigable waters). But for more than a century the geographic scope of the federally regulated navigable waters was the same.

When Congress uses a term of art, courts do not assume that its choice is haphazard or insignificant. Rather, courts presume that "Congress intended [the term] to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). The terms of the CWA thus do not permit

the Government's "hydrological connection" theory, which would obliterate the distinction between the "waters of the United States" and the "waters of the States." Indeed, in *Leovy* v. *United States*, this Court rejected jury instructions that would have defined a "navigable water of the United States" as any navigable waterway "'*connected with* waters that permitted a journey to another state,'" because such a construction would draw the constitutionality of the RHA into question. 177 U.S. 621, 633 (1900) (emphasis added). According to this Court:

> If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Id. For this reason—which applies with equal force here—this Court refused to "extend the paramount jurisdiction of the United States" under the RHA to "all the flowing waters in the states." *Id.*

The legislative history of the CWA confirms that Congress intended the concept of "navigability" to define the geographic scope of the waters of the United States. To be sure, Congress promulgated the CWA to remedy inadequacies in the prior application of the RHA as a pollution control statute. But Congress' actions must be placed in context. A major concern of Congress in 1972 was the Corps' reluctance to regulate beyond the "navigable in fact" waters and include those waters that could "reasonably be made" navigable.[5]

[5] *See, e.g.*, H.R. Rep. No. 92-1323, at 27 (1972) (stating that the Corps had "narrowly defined the waters to which these statutory provisions apply, and thus severely limited the scope of the law"); *id.* at 29-30 (noting that the language in the Corps' regulations was based on *The Daniel Ball*, but "more recent judicial opinions have substantially expanded that limited view of navigability" and citing *Appalachian Electric Power Co.* and *Economy Light & Power Co.*); *see also* H.R. Rep. No. 91-917, at 6-10 (1970) (observing that the Corps' permitting procedures did not adequately protect against the filling of substantial areas of submerged lands shoreward of harbor lines).

Thus, in the House, Representative Dingell explained that the CWA's definition was broader than "'navigable waters of the United States' in the technical sense," and should be "unencumbered by agency determinations which have been made or may be made for administrative purposes." 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 250-51 (Comm. Print, No. 93-1, 1973) ("*Leg. Hist.*"). Instead, citing *Appalachian Electric Power*, Representative Dingell explained that the CWA definition was intended to mirror

> more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.

Id. at 250 (omission in original); see also *Riverside Bayview Homes*, 474 U.S. at 133 ("Congress evidently intended . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").[6]

In its own contemporaneous interpretation of the Act, the Corps followed Congress' instruction and interpreted the

[6] Senator Muskie, Senate floor manager for the conference bill, also explained that the conferees intended to define "navigable waters" to include "all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact." 1 *Leg. Hist.* at 178.

CWA to extend to the "navigable waters" not only as defined in *The Daniel Ball*, but also as expanded in *Appalachian Electric Power*. Thus, the Corps' 1974 regulations established the agency's jurisdiction under the CWA as extending to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974); see also Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,115 (Apr. 3, 1974). The Corps noted that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." 33 C.F.R. § 209.260(e)(1) (1974). As this Court later observed, there is "no persuasive evidence that the Corps mistook Congress' intent in 1974." *SWANCC*, 531 U.S. at 168.

II. THE CORPS' DISCRETION TO DEFINE THE METES AND BOUNDS OF THE NAVIGABLE WATERS DOES NOT EXTEND TO EVERY GEOGRAPHIC FEATURE WITH A "HYDROLOGICAL CONNECTION" TO A NAVIGABLE WATER.

Although the CWA by its terms invokes only the traditional federal jurisdiction over navigable waters, it is not "easy . . . to define the size and character of a stream which would place it within the category of 'navigable waters of the United States.'" *Leovy*, 177 U.S. at 632. Thus, as a practical matter,

> [i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview Homes, 474 U.S. at 132. In *Riverside Bayview Homes*, this Court addressed an as-applied challenge to the Corps' assertion of jurisdiction over one such area—swampy marshland that abutted "the open waters of Black Creek, a navigable water of the United States." Reply Brief for the United States at 2, *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1984) (No. 84-701). In that context this Court held that the Corps could reasonably conclude that wetlands directly abutting traditional navigable waters were "inseparably bound up with the 'waters' of the United States." *Riverside Bayview Homes*, 474 U.S. at 134.[7] This was particularly so in light of "Congress' unequivocal acquiescence to" the Corps' assertion of jurisdiction over wetlands in 1977. *SWANCC*, 531 U.S. at 167.[8]

The boundary demarcation problems that allowed the Corps to interpret the "waters of the United States" to include wetlands directly abutting a navigable water do not permit the Corps to eviscerate the plain text of the Act. See *id.* at 172. As the facts of these cases show, the Government's "hydrological connection" theory would claim jurisdiction far beyond the "navigable waters," over their primary tributaries, the tributaries to those tributaries, and so on up the chain to

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[7] Because *Riverside Bayview* involved a wetland that abutted a traditional navigable water, this Court did not directly address the other aspects of the Corps' regulatory definition of "waters of the United States." Instead, this Court's decision—like Congress' debate on the definition of "waters of the United States"—"centered largely on the issue of wetlands preservation." *Riverside Bayview Homes*, 474 U.S. at 136.

[8] Of course, Congress has not "unequivocally acquiesce[d]" to the Corps' "hydrological connection" theory. That theory has never been articulated in *any* regulation, and certainly was not included in the version of the regulations that existed before 1977.

the "highest reaches of the tributary system."[9] Moreover, the Government claims jurisdiction over wetlands "adjacent to" each of those links in the upstream chain, no matter how far those wetlands are from open, navigable waters. In short, the instant cases do not require this Court to establish definitively the boundaries of the bodies of the "navigable waters" the CWA unequivocally protects, because the upland ditches and wetlands at issue in these cases are a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[10] *Id.* at 173 (rejecting claim of jurisdiction over "ponds that are not adjacent to open water,"[11]).

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[9] *See* Gary S. Guzy & Robert M. Anderson, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 6 (2001) (attempting to limit this Court's decision in *SWANCC* by asserting jurisdiction over "all tributaries to navigable waters or interstate waters, *upstream to the highest reaches of the tributary systems*") (emphasis added), *available at* http://www.saj.usace.army.mil/permit/documents/swancc.pdf.

[10] *Cf. SWANCC*, 531 U.S. at 171 (noting petitioner's position in that case that Congress authorized the inclusion of "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams," but declining to rule on the point); *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("The CWA . . . [is] not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."). As set forth above, the Government's jurisdictional theory in these cases would go far beyond the primary tributaries and streams that are "truly adjacent to navigable waters," and extend federal jurisdiction "to the highest reaches of the tributary system."

[11] The term "open water" is frequently used to indicate water that actually is navigable. *See, e.g., United States* v. *Louisiana*, 363 U.S. 1, 79 (1960) ("Louisiana relies on a 1954 statute of its own establishing the State's boundary at three leagues seaward of the line between inland and open waters."); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947) ("[V]essels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters.").

Before the Government may expand federal jurisdiction to the "highest reaches of the tributary system," it must show far more than a mere "surface hydrological connection" to a navigable water. Where, as here, "an administrative interpretation of a statute invokes the outer limits of Congress' power," the Government must show "a clear indication that Congress intended that result." *Id.* at 172. "This requirement stems from [a] prudential desire not to needlessly reach constitutional issues and [the] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The need for a clear congressional authorization "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* If no clear statement exists, the statute must be narrowly construed. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Government's "hydrological connection" theory would create a massive federal encroachment upon areas traditionally within the domain of the States. Since the founding of the Republic, the States have enjoyed primary "control of the waters within their borders," subject only to the "jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers." *Appalachian Elec. Power Co.*, 311 U.S. at 405. This distinction between the "waters of the United States" and the "waters of the States" has long been respected. To eliminate this distinction—or, as the Government would prefer, to limit the "waters of the States" to those few ponds and hollows that are completely "isolated" from the tributary system—would "extend the paramount jurisdiction of the United States over all the flowing waters in the states," to the detriment of the long-standing authority of those States. *Leovy*, 177 U.S. at 162.

Moreover, the "dredge-and-fill" permitting program at issue in these cases regulates land and water use, and "[t]he

regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). In its modern incarnation, the Corps' "dredge-and-fill" permitting process has little to do with the protection of navigation. Instead, the Corps' permit application process is essentially a system of land use regulation implemented by a federal agency. The Corps subjects each dredge-and-fill permit application to a plenary "public interest review," in which the Corps considers such general police power concerns as:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a)(1).[12] As the Government concedes, the exercise of this authority "as a practical matter affect[s] activities (*e.g.*, residential housing development) that are also subject to extensive state regulation." Rapanos Opp. 25 (citation omitted).[13] These effects are substantial. If the Corps

[12] The Corps' "general permit" process—an ostensibly "streamlined" permitting process for smaller and simpler projects—also requires compliance with detailed requirements set forth in 70 pages of the Federal Register, including such land-use practices as the provision of vegetated buffer zones. *See* Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2020 (Jan. 15, 2002).

[13] In many States these activities are subject to extensive state *wetlands* regulation. *See, e.g.*, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003) ("*SWANCC* ANPRM") (observing that 15 States had enacted "isolated wetlands" regulatory programs prior to *SWANCC* and that additional States considered and adopted programs after *SWANCC*).

rejects a permit application, the project cannot go forward, regardless of the opinions of those state and local regulatory authorities. See *SWANCC*, 531 U.S. at 162-65 (addressing a project sponsored by 23 suburban Chicago cities and villages and approved by all necessary state and local authorities, but rejected by the Corps).

This Court has held that the Corps' expansive interpretation of its dredge-and-fill permitting program "imping[ed]" upon "the States' traditional and primary power over land and water use." *Id.* at 174. The CWA contains no clear statement authorizing the agencies to override this traditional balance and assert jurisdiction over all "hydrologically connected" areas "to the highest reaches of the tributary system." Instead, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources.'" *Id.* at 166-67 (quoting 33 U.S.C. § 1251(b)).

Even apart from this "clear statement" rule, the agencies' "hydrological connection" theory is not entitled to ordinary deference under *Chevron*. The agencies' position simply lacks the "thoroughness," "validity," and "consistency" required to merit judicial deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). The agencies have not justified the need to regulate the deposit of "fill material" into remote areas far away from any navigable waters. Instead, the agencies' sole position since the passage of the Act has been the ceaseless aggrandizement of geographic jurisdiction.[14] Even post-*SWANCC*, after first conceding that the public interest required "clarifying what waters are subject to CWA jurisdiction and affording full protection to those waters through an appropriate focus of Federal and State re-

[14] *Cf. National Mining Ass'n* v. *United States Army Corps of Engr's*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (observing in reviewing the Corps' definition of "discharge of dredge and fill material" that the "overriding purpose" of the Corps' regulation "appear[ed] to be to expand the Corps' permitting authority").

sources," *SWANCC* ANPRM, 68 Fed. Reg. at 1991, the Government reversed course, announcing its intention to focus on "preserv[ing] the federal government's authority." Press Release, U.S. Army Corps of Eng'rs, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/swanccrelease.htm. This is not the sort of thorough or measured agency determination that deserves deference.

Finally, as the history of the *Rapanos* case vividly demonstrates, the CWA carries criminal penalties, which require the Act to be construed narrowly absent a clear statement to the contrary. *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This is for good reason. The farther away from truly navigable waters the Corps asserts jurisdiction, the more likely it is that a homebuilder or contractor will fail to perceive the potential applicability of the Act and fail to obtain a permit to engage in, for example, "landclearing," "ditching," or "earth-moving." 33 C.F.R. § 323.2(d)(2)(i). This Court "should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations" in this manner. *Hanousek* v. *United States*, 528 U.S. 1102, 1003 (2000) (Thomas, J., with O'Connor, J., dissenting from denial of certiorari).

III. THE GOVERNMENT'S EXPANSIVE "HYDROLOGICAL CONNECTION" THEORY IS NOT NECESSARY TO PROTECT THE NAVIGABLE WATERS FROM UPSTREAM POLLUTING ACTIVITIES.

The Government's contortion of the language of the CWA and incursion into the traditional province of the States is particularly grievous because it is completely unnecessary. The agencies do not need to federalize broad swaths of the nation's landscape to protect the navigable waters from pollution from upstream discharges—as a matter of statutory interpretation or as a matter of basic science. The CWA is far

more naturally read to allow the agencies to regulate *activities* that pollute federal waters than to federalize the upland waters and wetlands that have long been the exclusive domain of the States.

Under the plain language of the CWA, the agencies have authority in appropriate cases over upstream activities that pollute the navigable waters, through their authority over the "discharge of any pollutant." 33 U.S.C. § 1311(a). If a discharge from an upstream point source will pollute the navigable waters and its control is "necessary to achieve Congressional goals in protecting navigable waters," Rapanos Opp. 22, the CWA provides the agencies the authority they require.[15]

The CWA creates two permitting schemes for discharges from a point source. Section 404(a) authorizes the Secretary of the Army (acting through the Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). This is the permitting scheme at issue in the instant cases. Section 402 authorizes EPA to issue permits for all other discharges of pollutants from point sources to navigable waters. See *id.* § 1342. These generally include discharges of the sorts of liquid pollutants and soluble chemicals that flow to navigable waters from an upstream source.

The agencies' approach to regulating these two types of pollutants through broad geographic interpretations of the

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[15] In fact, EPA has purported to assert this authority in some cases by improperly attempting to regulate *entire construction sites* that it contends "may" lead to a discharge to the waters of the United States (as that term in turn is broadly defined by EPA and the Corps)—a jurisdictional approach that *amici* contest. This case does not present the question of the specific limits of EPA's authority under Section 402. For present purposes, it suffices to say that the statutory framework of the CWA allows the agencies to regulate discharges from point sources that flow downstream and pollute the navigable waters. *See In re Needham*, 354 F.3d at 346.

"waters of the United States" has led to an anomaly, which these cases vividly reflect. The activities regulated by the Corps under Section 404 of the Act—"dredge and fill" of earthen material—do not pose the same risks of downstream pollution as many of the activities regulated by EPA under Section 402. Thus, the Government's focus on the upstream *geographic* expansion of "waters of the United States"—as opposed to the regulation of upstream *activities*—has led the Corps to regulate the deposit of fill material in upland areas, which poses little or no risk of conveying pollutants to navigable waters. Refocusing the agencies' attention on the *activity* of a discharge—and away from plenary jurisdiction over practically all the waters and wetlands in the United States—would correct that incongruity.

The CWA provides the agencies the authority to address upstream activities that pollute downstream navigable waters. The statutory definition of "discharge of any pollutant" is broad. Congress defined the "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The fact that certain pollutants may not be discharged directly into the navigable waters, but instead flow through intermediate conveyances to the navigable waters, does not preclude EPA from addressing those discharges. See *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (holding that the term "discharge of a pollutant" "includes within its reach point sources that do not themselves generate pollutants" but simply "convey" pollutants to navigable waters). Thus, if a discharge from an upstream point source flows to a downstream navigable water and affects the "chemical, physical, and biological integrity of" that water, 33 U.S.C. § 1251(a), then the CWA makes clear that the offending "discharge of pollutants [can] be controlled at the source," through the issuance of an "NPDES" discharge permit or by penalizing the unpermitted polluter. *Riverside Bayview*

Homes, 474 U.S. at 133 (quoting S. Rep. No. 92-414, at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).[16]

In *In re Needham*, for example, the Fifth Circuit held that a discharge of oil into a non-navigable drainage ditch is regulable under the Oil Pollution Act of 1990,[17] because the residue of the spill entered Bayou Folse, which is "navigable-in-fact or adjacent to an open body of navigable water." 354 F.3d 340, 346 (5th Cir. 2003). Importantly, the court did not determine that the waterways between the discharge and Bayou Folse were themselves "waters of the United States." The fact that the ultimate receiving water was "adjacent to an open body of navigable water" was "sufficient to resolve th[e] matter." *Id.* at 345-36 & n.11.

Thus, the statutory definition of "discharge of a pollutant" allows EPA to address upstream polluting discharges without requiring the designation of the intervening areas as "navigable waters" or "waters of the United States"—which is the agencies' current approach. Given the existence of an obvious statutory solution, the agencies' approach treats the language of the CWA and the traditional prerogatives of the States far too casually.

Moreover, the agencies have provided no evidence that their approach is scientifically necessary. As a matter of basic physics, "dredge and fill material," such as rock, sand and

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[16] Under EPA's existing regulations, the "discharge of a pollutant" includes discharges through intermediate conveyances, including:

> additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

40 C.F.R. § 122.2.

[17] The Oil Pollution Act of 1990 regulates the discharge of oil into "navigable waters," defined (as in the CWA) as "the waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21).

earth, behaves differently when deposited on the land and in water than do liquid and soluble pollutants. Because rock, sand and earth are made up of relatively large, heavy particles, they are not transported any appreciable distance downstream during ordinary water flows. See Wetland Sci. Applications, Inc., Dkt. No. OW-2002-0050-1835, *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act* 36, 40 (2003) ("*Technical Principles*"). See generally Luna B. Leopold, *A View of the River* 188-91 (1994) (describing the limited movement of large particles). For this reason, depositing "fill" material in an upland area—even an upland area that technically qualifies as a "wetland"—does not pose the same risk to downstream navigable waters as the upstream discharge of liquid chemical or oily materials.

As a result, the deposit of earthen material any appreciable distance from a navigable water poses little to no risk of polluting that water. See *Technical Principles* at 34, 62.[18] This is especially true in the dry and remote areas that the Government's "hydrological connection" theory would reach. Many of these remote channels, ditches and wetlands have no water in sight and are usually not recognizable as "waters" at all. For example, in the western United States, "[a]long the ephemeral streams which dominate the arid and semiarid landscape, transmission losses through seepage cause flood peaks and total discharge values to decline in the downstream direction. These losses are so great that eventually most flows decline to zero" before they ever reach a navigable water. William L. Graf, *Fluvial Processes in Dryland Rivers* 94 (1988); see also U.S. Army Corps of Eng'rs, *Final Summary Report: Guidelines for Jurisdictional Determinations for Waters of the United States in the Arid Southwest* 3 (2001) (noting that transmission losses of ephemeral streams in dryland areas "are so large that eventually most surface flows decline to zero"); *Technical Principles* at 62 (same).

[18] Accordingly, unlike in wetlands that "actually abut[]" navigable waters, the Corps cannot reasonably conclude that "in the majority of cases," the deposit of fill material in upland areas would "have significant effects on water quality and the aquatic ecosystem." *Riverside Bayview Homes*, 474 U.S. at 135 & n.9.

Thus, the Government is wrong to say that "'[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.'" Rapanos Opp. 12 (quoting *United States* v. *Deaton*, 332 F.3d 698, 707 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004)). Whatever the validity of that statement for the sorts of ambulatory pollutants regulated under Section 402, it is simply not true for the fill material regulated under Section 404. Perhaps this is why, in attempting to justify the constitutionality of its jurisdictional approach, the Government pays only lip service to the alleged "harm caused by . . . the release of sediment downstream." *Id.* at 24. The Government's primary argument (and the argument relied upon by the expert witness in the Rapanos case below) is that "the *filling* of wetlands . . . reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters." *Id.* The plain language of the CWA does not authorize the Corps to regulate the mere "filling of wetlands," wherever they may be located. It authorizes the agencies to regulate "discharges" to the "waters of the United States."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the courts of appeals.

Respectfully submitted,

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
STEPHEN M. NICKELSBURG
ILEANA M. CIOBANU
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel for Amici Curiae

* Counsel of Record

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Nos. 04-1034 and 04-1384

In the Supreme Court of the United States

JOHN A. RAPANOS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

JUNE CARABELL, ET AL., *Petitioners*

v.

U. S. ARMY CORPS OF ENGINEERS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR WESTERN COALITION OF ARID STATES ("WESTCAS") AS AMICUS CURIAE SUPPORTING REVERSAL

LAWRENCE S. BAZEL
Counsel of Record
JOHN BRISCOE
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street
Seventh Floor
San Francisco, California 94104
(415) 402-2700
(415) 398-5630 (Fax)

QUESTION PRESENTED

Do tributaries within the jurisdiction of the Clean Water Act extend so far upstream that they include large areas of dry land?

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CONSENT OF THE PARTIES

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the Western Coalition of Arid States respectfully submits this Brief as Amicus Curiae supporting reversal of the judgments below.[1]

INTEREST OF THE AMICUS

The Western Coalition of Arid States ("WESTCAS") represents its members on water and wastewater issues relevant to the arid West. Its members include more than one hundred water and wastewater utilities in Arizona, California, Colorado, Nevada, New Mexico, Oregon, and Texas. WESTCAS members operate storm sewers and other municipal facilities that discharge into desert washes, drainage ditches, concrete-lined flood-control channels, and other areas that normally are dry, or at most carry a trickle of runoff from overzealously watered lawns.

These dry channels are invariably characterized as "waters of the United States" by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of

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[1] No counsel for any party authored any part of this brief and no one other than Amicus Curiae made any monetary contribution to the preparation and submission of this brief.

Engineers ("Corps"). Dry channels thereby become regulated under the Clean Water Act. Despite their dryness, these "waters" take on the regulatory classifications of actual bodies of water downstream, and become classified for fishing, swimming, and other uses such as drinking-water supply. These classifications, and the criteria established to protect them, are known as "water-quality standards". WESTCAS members are issued federal permits prohibiting the discharge of any substance in concentrations that might interfere with fishing or swimming in the dry channel, or otherwise cause the channel to exceed applicable water-quality standards. In this way, federal and state agencies declare that dry channels of the arid West must be protected for fishing and swimming, and exercise their authority to impose and enforce Clean Water Act requirements intended for wet waters.

Worse, discharges into dry channels are more heavily regulated than most discharges into wet waters. Regulators do not need to impose special requirements on most discharges into wet waters, where the discharge is diluted and quickly assimilated without causing violations of water-quality standards. Because dry channels lack water for dilution, regulators may impose special requirements to ensure that the dry channel does not exceed its water-quality standards, and that the classified uses are fully protected.

It does no good to point out that fish cannot live on dry land, or that swimmers cannot swim without water. Because the dry channel automatically receives the classification of a wet water downstream, the classified uses must be protected until the dry channel is reclassified. Why not simply reclassify? Alas, reclassification is extremely difficult at best, and often impossible.

As a result, EPA and state agencies using delegated federal authority are beginning to impose stringent requirements to protect swimming and fishing in places where these activities are constrained by the lack of water. These requirements will impose unnecessary and unreasonable costs on those who pay for municipal stormwater and wastewater treatment—the public.

Much of the problem can be solved simply by limiting the Clean Water Act's protection of fishing and swimming to channels fit for fishing and swimming—that is, to actually navigable waters and wet tributaries inseparably bound up with them.

SUMMARY OF THE ARGUMENT:

"TRIBUTARY" SHOULD NOT BE DEFINED SO BROADLY THAT IT INCLUDES VIRTUALLY ALL DRY LAND

WESTCAS submits this brief to make three simple points about tributaries, which may come within the jurisdiction of the Clean Water Act as extensions of "navigable waters" or "waters of the United States". (*See* Clean Water Act §§ 502(12), 502(7), 33 U.S.C. §§ 1362(12), 1362(7) (defining "discharge of a pollutant" as addition of pollutant to navigable waters, and "navigable waters" as waters of the United States).)

First, several courts of appeals have abused the tributary concept by defining the word to include large expanses of dry land. The Sixth Circuit held that Clean Water Act jurisdiction "can be satisfied by the presence of a hydrological connection", which can be established by artificial "tributaries" such as roadside ditches and drains. (*United States v. Rapanos*, 376 F.3d 629, 639, 642-43 (6th Cir. 2004) ("*Rapanos II*"); *accord Carabell v. United States*, 391 F.3d 704, 708 (6th Cir. 2004).) The Ninth and Fourth Circuits agree. (*Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canal); *United States v. Deaton*, 332 F.3d 698, 708-712 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (roadside ditch); *see also United*

States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997), *cert. denied*, 522 U.S. 899 (man-made ditches and canals); *Quivira Mining Co. v. United States*, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986) (gullies and arroyos).) The "hydrological connection" need not be an actual hydrological connection in which water is flowing at the time of the discharge; instead, the connection is established even if water flows only intermittently or seasonally, or only during significant or intense rainfall. (*Headwaters* at 534 (intermittent); *Rapanos II* at 643 (seasonal); *Eidson* at 1342 (significant rainfall); *Quivira* at 130 (intense rainfall).) None of these cases limits how far inland a tributary extends.

These cases go too far. By defining "tributary" to include artificial channels, they extend the concept not only to roadside ditches and irrigation canals but arguably also to urban gutters, concreted storm drains, and even underground storm sewers. By defining "tributary" to include intermittent hydrological connections, these cases extend "waters of the United States" to cover virtually all dry land, because with few exceptions rain falls on land and then flows downhill, eventually reaching a navigable water and thereby establishing an intermittent hydrological connection. Yet surely Congress did not intend the Clean Water Act to apply to Western deserts, mountain peaks, urban streets, and all the

otherwise dry land where rain falls and runs off. Dry land is not a *water* of the United States.

These concerns are not merely hypothetical. Federal agencies routinely classify dry land in the arid West as waters within the jurisdiction of the Clean Water Act. For example, the Corps of Engineers takes the position that all natural drainage features, including dry desert washes and dry eroded cuts high up on a mountain ridge, are waters of the United States so long as the dry land includes any perceptible mark left by flowing water. (*See* 33 CFR §§ 328.4, 328.3(e).)

Second, this Court has effectively excluded dry land from the scope of regulated waters in its previous wetland cases, which explain that wetlands within the jurisdiction of the Clean Water Act have a "significant nexus" with navigable waters, and are "inseparably bound up" with them. (*Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159, 167 (2001) ("*SWANCC*"), citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 1985).) The Sixth Circuit, however, has not respected the word "significant" in the phrase "significant nexus". Instead, it has asserted that any nexus—any hydrological connection—is sufficient. (*Rapanos II*, 376 F.3d at 639 ("What is required for CWA jurisdiction . . . is a 'significant nexus . . .' . . . , which can be satisfied by the presence of a hydrological connection").) The Fifth Circuit, in comparison,

has properly held that dry land and intermittent creeks are not waters of the United States. (*Rice v. Harken Exploration Company*, 250 F.3d 264, 270-271 (5th Cir. 2001); *see In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (no jurisdiction over "puddles, sewers, roadside ditches and the like").) Tributary waters should be treated as within the jurisdiction of the Clean Water Act only when they are so "inseparably bound up" that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in a navigable water. (*See Rice* at 272.)

Third, the decisions improperly extending Clean Water Act jurisdiction to tributaries rest on the mistaken notion that jurisdiction must be extended to protect the truly navigable waters. In the words of the Fourth Circuit, a discharge into a tributary has "the potential to move downstream and degrade the quality of the navigable waters". (*Deaton*, 332 F.3d at 707.) But anything deposited almost anywhere on dry land has the potential to be washed into navigable waters. Rain undoubtedly washes into navigable waters some droppings of bears in the woods, cows in the fields, and dogs on city streets, but Congress could hardly have intended "navigable waters" to include every wood, field, and street. The Clean Water Act simply does not regulate discharges with nothing more than the *potential* to

be carried into navigable waters. It regulates only actual discharges into navigable waters.

And that is enough. When point-source discharges into tributaries flow far enough to reach a navigable water, they are regulated directly as discharges into navigable waters. (*See e.g. Needham*, 354 F.3d at 346 (proper inquiry is whether farthest traverse of spill reached navigable or ~~adjacent~~ waters); *Eidson*, 108 F.3d at 1340 (discharge flowing through storm drain treated as discharge to navigable water).) Discharges eventually carried to navigable water by stormwater runoff are regulated indirectly through the permitting of stormwater discharges. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p).) Both are also within the jurisdiction of state and local governments, which regulate the discharge of wastes into water and the dumping of wastes onto the ground. Therefore, navigable waters can be protected without categorizing dry land as waters of the United States.

For these reasons, the decisions of the Sixth Circuit in the *Rapanos II* and *Carabell* cases should be reversed.

ARGUMENT

I. Courts And Federal Agencies Have Defined "Tributary" To Include Dry Land

Corps regulations define "waters of the United States" to include wetlands adjacent to tributaries of navigable waters. (*Carabell*, 391 F.3d at 708, *citing* 33 C.F.R. § 328.1(a).) Here the wetlands at issue in both *Rapanos II* and *Carabell* were determined to be within the jurisdiction of the Clean Water Act because they were adjacent to non-navigable tributaries. (*Id.*; *Rapanos II* at 641-642.) The proper definition of "tributary" is therefore an issue fairly subsumed within the questions presented by petitioners.

When determining which tributaries are within the jurisdiction of the Clean Water Act, the Sixth Circuit has used expansive language. It has held that jurisdiction extends to "any branch of a tributary system that eventually flows into a navigable body of water". (*Rapanos II*, 376 F.3d at 639, *citing United States v. Rapanos*, 339 F.3d 447, 452-53 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) ("*Rapanos I*").) In *Carabell*, it quoted the Fourth Circuit's conclusion that the Corps could properly determine that the agency had jurisdiction "over the whole tributary system of any navigable waterway". (*Carabell* at 710, quoting *Rapanos I* at 452, quoting *Deaton*, 332 F.3d at 712.) Because the Fourth Circuit rejected the argument that tributary

jurisdiction ends at the "headwaters" of a tributary, where there is a minimum flow, these cases can fairly be read as extending jurisdiction to dry land. (*See Deaton* at 710.)

In addition to the Fourth and Sixth Circuits, the Ninth Circuit has given the word "tributary" an expansive interpretation, as has the Tenth and Eleventh Circuits in cases decided before *SWANCC*. For these courts, a tributary does not need to be a natural body of water, but can instead be an artificial construct such as a drain or roadside ditch. (*Rapanos II* at 642-43; *Rapanos I* at 453; *Carabell* at 708; *Deaton* at 708-12; *Headwaters*, 243 F.3d at 533 (9th Cir., irrigation canal); *Eidson*, 108 F.3d at 1342 (11th Cir., man-made ditches and canals); *Quivira*, 765 F.2d at 130 (10th Cir., gullies and arroyos).) The "hydrological connection" need not be an actual hydrological connection in which water is flowing at the time of the discharge; instead, the connection is established even if water flows only intermittently or seasonally, or only during significant or intense rainfall. (*Headwaters* at 534 (intermittent); *Rapanos II* at 643 (seasonal); *Eidson* at 1342 (significant rainfall); *Quivira* at 130 (intense rainfall).) In the 10th Circuit, the hydrological connection can be *underground*, and so slow that the travel time is "a lengthy period, perhaps centuries". (*Quivera* at 129-30.)

These definitions confuse a tributary with a drainage basin (also called a "watershed"). According to the U.S. Geological Survey, which monitors streamflows in the United States, a tributary is "a smaller river or stream that flows into a larger river or stream." (Water Science Glossary of Terms, http://ga.water.usgs.gov/edu/dictionary.html.) A drainage basin is the "land area where precipitation runs off into streams, rivers, lakes, and reservoirs." (*Id.*) The Mississippi River drainage basin, for example, extends from the Rockies to the Appalachians, covers more than a million square miles, and drains 41 percent of the 48 contiguous states. (Corps, The Mississippi River and Tributaries Project, http://www.mvn.usace.army.mil/pao/bro/misstrib.htm.) The Potomac River basin, although much smaller, stretches across parts of four states and drains more than 14,000 square miles. (Interstate Commission on the Potomac River Basin, Basin Facts, http://www.potomacriver.org/about_potomac/basin-facts.htm.)

When cases such as *Eidson* and *Quivira* define "tributary" by a wet connection with a navigable river during times of substantial rain, they include the entire drainage basin. The necessary hydrological connection is formed whenever rain falls anywhere in a drainage basin and flows to the navigable river draining the basin. Because almost all the land in the United States is drained by a navigable river, these

cases would define almost all the land in the United States as a "water of the United States".

And not just the land. If these cases mean what they say, the roof of the Supreme Court Building is a water of the United States, because the roof maintains an intermittent hydrological connection with navigable waters. Rain falling on the roof undoubtedly flows to a drain, down the drain to the sewers of Washington DC, through the sewers to the Anacostia or Potomac River, and down the river to Chesapeake Bay and the Atlantic Ocean.

The Corps recognizes that a tributary must be less than the entire drainage basin, but still defines the word to include dry land. According to the Corps, "The upstream limit of waters of the United States is the point where the [ordinary high water mark] is no longer perceptible". (65 Fed.Reg. 12818, 12823; *accord* 33 CFR § 328.4.) The phrase "ordinary high water mark" means "that line on the shore established by the fluctuations of water". (33 CFR § 328.3(e).) Unfortunately, the Corps interprets this definition to mean only that a mark must be present, and brushes aside comments suggesting that water must ordinarily be present. (65 Fed.Reg. at 12823.) In the arid West, marks left by flowing water are quite common, because they are not obscured by vegetation. They are particularly evident in deserts, where drainage patterns can be

seen over large barren areas. Marks left by flowing water extend to the very tops of mountain ridges. The drier the landscape, the more likely one is to find upland "waters of the United States".

According to the Corps, its jurisdiction reaches beyond natural channels to drainage ditches that "extend the [ordinary high water mark] of an existing water of the United States" and that "connect two waters of the United States". (*Id.*) Whatever these phrases may mean—the Corps seems unsure itself—they allow the Corps to assert jurisdiction over ordinary roadside ditches. (*Deaton* at 704, 710-711.)

By extending its jurisdiction to artificial channels, the Corps raises an important issue for Western municipalities: Are storm drains waters of the United States? In the arid West, stormwater is often managed by a system of aboveground channels, which may be sophisticated concrete structures or simple ditches. If these storm drains *are* waters of the United States, then they are not point sources, and do not need NPDES permits. (*See South Florida Water Management District v. Miccosukee Tribe Of Indians*, 541 U.S. 95, 112 (2004) (no NPDES permit needed for transfer of water between two water bodies that are not "meaningfully distinct").) If the storm drains *are not* waters of the United States, they may be regulated as point sources. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p); 40 CFR § 122.26.)

The Corps recognizes this problem, but leaves it unresolved: "Stormwater management facilities constructed in waters of the United States may, under certain circumstances, be considered waters of the United States." (65 Fed.Reg. at 12824.) No circumstances are identified.

The Fourth and Sixth Circuits do not have the restraint of the Corps. The Fourth Circuit held that "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", and adopted a dictionary definition of "tributary" that "would encompass the entire feeder system". (*Deaton* at 710-711.) Taken literally, the "entire feeder system" would include not only natural tributaries and artificial roadside ditches, but also wholly underground storm sewers and the system that feeds those sewers, including roof gutters, downspouts, and roadside gutters. With decisions like these, we should not wonder that the State of California has concluded that "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States", and that a municipal system includes "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains". (California Regional Water Quality Control Board, San Diego Region, Order No. 2001-01, NPDES No. CAS0108758, Waste Discharge

Requirements For Discharges Of Urban Runoff From The Municipal Separate Storm Sewer Systems (MS4s) Draining The Watersheds Of The County Of San Diego, The Incorporated Cities Of San Diego County, And The San Diego Unified Port District, at D-4, D-8 (February 21, 2001) http://www.waterboards.ca.gov/sandiego/programs/stormwater/sd%20permit/Order%20No.%202001-01%20Final%20with%20attachmentss.pdf.) Despite this characterization of municipal storm-sewer systems as waters of the United States, California regulates them as point sources. (*Id.*)

The classification of dry channels and municipal storm drains as waters of the United States threatens municipalities with exorbitant costs that will produce little or no environmental benefit. Because stormwater is not centrally collected and treated like sanitary wastewater, municipalities have only limited control over stormwater quality. Ensuring that dry channels comply with water-quality standards may be impossible at any cost. And what will be gained from all this regulation and expense? Even if municipalities discharged Perrier water instead of stormwater, the dry channels would return to their dry condition soon after the rain ended, and would remain unfit for swimming and fishing because of the lack of water.

In summary, the definition of "tributary" has improperly been extended to include all the land extending from a navigable river to the tops of the mountain ridges at the edges of its drainage basin, and to artificial structures including urban streets and gutters.

II. Tributary Jurisdiction Should Be Limited To Waters Inseparably Bound Up With Navigable Waters

The problems caused by an overexpansive definition of "tributary" can be solved by applying the concepts of *SWANCC* and limiting tributary jurisdiction to those waters that have a "significant nexus" and are "inseparably bound up" with navigable waters. (*See SWANCC* at 167.) Unfortunately, in extending tributary jurisdiction to any hydrological connection, the Fourth and Sixth Circuits have changed the standard from "significant nexus" to any nexus. (*See Deaton* at 710-711; *Rapanos II* at 639 ("a 'significant nexus . . .' . . . can be satisfied by the presence of a hydrological connection".)

The Fifth Circuit, however, has properly interpreted the concepts established in *SWANCC*. It has concluded that jurisdiction "is not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters", and that "the United States may not simply impose

regulations over puddles, sewers, roadside ditches and the like". (*Needham*, 354 F.3d at 345; *see Needham* at 344 (jurisdiction under Oil Pollution Act same as Clean Water Act).) Jurisdiction should not be extended to regulate discharges "that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" (*Rice*, 250 F.3d at 272.) Discharges are subject to regulation only if there is a "close, direct, and proximate link" between the discharges and "resulting actual, identifiable . . . contamination of a particular body of natural surface water" that satisfies jurisdictional requirements. (*Id.*)

This Court should adopt the Fifth Circuit's application of the *SWANCC* standard, and hold that tributary waters are within the jurisdiction of the Clean Water Act only when they are so inseparably bound up with a truly navigable water that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in the navigable water.

III. The Overextended Definition of "Tributary" Is Not Needed To Protect Navigable Waters

Natural water is never pure H_2O. Even normal rainwater has an acidic pH of 5.5, rather than a neutral pH of 7.0, because carbon dioxide dissolves into the rain as it falls and forms carbonic acid. (*See* http://www.epa.gov/acidrain/.) As

water runs over and through the land, it dissolves some of what it comes into contact with, and washes some into navigable waters. In agricultural areas, cow droppings may fall directly into navigable waters, or be carried in by stormwater. (*See Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1093, 1098-1099 (1998), *cert. denied*, 528 U.S. 964 (1999).) No doubt bison droppings also fell directly into navigable waters, and were carried in by stormwater, when millions of bison roamed the Great Plains. Because rain falls almost everywhere, and runs off the land into navigable waters, almost anything exposed to rain has some potential for affecting water quality in navigable waters.

The courts of appeal are therefore wrong when they suggest that the potential to affect navigable waters defines a tributary. (*See e.g. Deaton* at 707 ("Any pollutant or fill material that degrades water quality in a tributary has the potential to move downstream and degrade the quality of the navigable waters themselves"); *Rapanos I* at 451; *Rapanos II* at 639-640; *Headwaters* at 534 ("as long as the tributary would flow into the navigable body . . ., it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act"), quoting *Eidson* at 1342.) Nowhere does the Clean Water Act imply that "waters of the United States" are to be determined by these standards of

"potential to move downstream" and "capable of spreading environmental damage". If these were truly the standards to be applied, they would make Corps regulations meaningless, because surely fill material placed on the bank of a navigable water has more potential to move into the navigable water and spread environmental damage than the same fill placed in a wetland miles away and connected to the navigable water only through a series of roadside ditches and drains.

The Sixth Circuit reads too much into the statement in the Legislative History that "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." (*Rapanos I* at 451.) Regardless of how water moves, Congress explicitly limited the reach of the Clean Water Act to "point" sources, and imposed only general planning requirements on nonpoint sources. (Clean Water Act §§ 301(a), 502(12), 33 U.S.C. §§ 1311(a), 1362(12) (prohibiting point-source discharges into navigable waters), §§ 208(b)(2)(F), (K), 33 U.S.C. §§ 1288(b)(2)(F), (K) (planning process to consider control of "agriculturally and silviculturally related nonpoint sources of pollution" and "the disposal of pollutants on land").) Congress therefore excluded many sources, and many waters, from regulation under the Clean Water Act.

The courts of appeal are also wrong to the extent that they suggest that discharges to non-navigable waters cannot

be regulated under the Clean Water Act, even if they pollute navigable waters. Discharges that reach navigable waters by way of non-navigable waters and artificial conveyances such as pipelines are routinely treated as discharges to navigable waters. In *Needham*, for example, the Fifth Circuit held that the proper inquiry in determining whether an oil spill violated the Oil Pollution Act was not where the oil was initially deposited, but whether it reached navigable waters or jurisdictional adjacent waters. (*Needham* at 346; *but cf. Rice* at 272 (generalized assertion that covered surface waters will eventually be affected insufficient).) In *Eidson*, the defendant discharged material to a storm sewer, and the material apparently flowed through the sewer to a ditch. (*Eidson* at 1340.) In upholding the conviction, the Eleventh Circuit never stopped to consider whether the storm sewer was a water of the United States. It treated the discharge as a discharge to the ditch, which it found to be a navigable water. (*Id.* at 1342-1343.) In this way, point-source discharges that reach navigable waters are routinely subject to Clean Water Act requirements.

Discharges that reach navigable waters indirectly, when they are carried downstream by rain, are regulated as stormwater discharges. (*See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p); 40 CFR § 122.26.) They are also regulated by state and local governments. (*See e.g.* California Water

Code § 13050(e) (defining "waters of the state" to include all surface water and groundwater), § 13260 (requiring report of waste discharges that could affect waters of state), § 13263 (authorizing state agency to issue waste-discharge requirements), § 13264 (prohibiting discharge of waste before filing report with state agency), §13304 (authorizing state agency to issue cleanup and abatement order for wastes deposited where they may create a condition of pollution or nuisance); Fish & Game Code § 5650 (prohibiting deposit of substances deleterious to fish where they may pass into the waters of the state).) Navigable waters can therefore be well protected without categorizing all tributaries and dry land as waters of the United States.

In summary, by misusing the concept of a tributary, several courts of appeals have defined "waters of the United States" so broadly that the phrase covers virtually all the land in the United States. Clean Water Act jurisdiction should extend only to those tributaries that are so inseparably bound up with a truly navigable water that a discharge into the tributary will produce imminent, actual, identifiable, and significant contamination in the navigable water. A more expansive definition would be inconsistent with Corps regulations and the specific provisions of the Clean Water Act.

CONCLUSION

For these reasons, the decisions of the Sixth Circuit in the *Rapanos II* and *Carabell* cases should be reversed.

Respectfully submitted,

LAWRENCE S. BAZEL
Counsel of Record
JOHN BRISCOE
Briscoe Ivester & Bazel LLP
Attorneys for Amicus Curiae
Western Coalition of Arid States ("WESTCAS")

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Nos. 04-1034 and 04-1384

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In The
Supreme Court of the United States

JOHN A. RAPANOS, et ux., et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE WESTERN ORGANIZATION OF RESOURCE COUNCILS, IDAHO RURAL COUNCIL, NORTHERN PLAINS RESOURCE COUNCIL, POWDER RIVER BASIN COUNCIL, DAKOTA RESOURCE COUNCIL, OREGON RURAL ACTION, WESTERN COLORADO CONGRESS, COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, CONCERNED CITIZENS FOR CLEAN WATER, AMIGOS BRAVOS, NEW MEXICO ACEQUIA ASSOCIATION, HEADWATERS, OREGON NATURAL RESOURCES COUNCIL, SNAKE VALLEY CITIZENS' ALLIANCE, NORTHERN CALIFORNIA RIVER WATCH, ARIZONA WILDLIFE FEDERATION, WALKER LAKE WORKING GROUP, WYOMING OUTDOOR COUNCIL, IOWA FARMERS UNION and MINERAL COUNTY IN SUPPORT OF RESPONDENTS

CHARLES M. TEBBUTT
Counsel of Record
Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401
541-485-2471

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QUESTIONS PRESENTED
(as presented by Petitioners)

No. 04-1034
Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

No. 04-1384
Carabell v. United States Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTERESTS OF AMICI CURIAE[1]

The organizations, all non-profit corporations, and one county government represented in this brief represent people who live throughout the arid West, the Pacific Coast and parts of the Midwest. Many of the organizations' members include farmers and ranchers whose economic well-being and sustenance depends upon the seasonal streams, wetlands, playa lakes, prairie potholes, vernal pools and other aquatic features that also comprise most of the aquatic habitat of the West. Many of the people represented by these entities rely upon scarce surface waters of the West and would be economically devastated without the protections afforded by the Clean Water Act, while the remainder would also have their quality of life drastically diminished by the restrictions on federal Clean Water Act jurisdiction sought by the Petitioners. Many amici members rely upon surface waters to irrigate their crops and provide drinking water for themselves and their livestock, while others are dependent upon surface waters to provide recreational opportunities that support their communities.

Western Organization of Resource Councils is a network of grassroots organizations from seven states (Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota and Wyoming) that includes 9,500 members and 46 local community groups. With most of the region

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[1] The Petitioners have filed blanket letters consenting to the participation of amici. Respondent has consented by letter, a copy of which has been filed with the Clerk, to participation by amici. No counsel for any party authored any part of this brief and no one other than amici curiae made any monetary contribution to the preparation and submission of this brief.

receiving just 10-20 inches of rain a year, landowners rely on access to clean, mountain-fed irrigation water and groundwater to prosper.

Idaho Rural Council members are family farmers, ranchers and rural Idahoans committed to preserving the economic well-being of their communities. Clean water is an absolutely critical resource to sustain present and future domestic, livestock and other agricultural uses which are especially important in the high desert areas of Southern Idaho where many members live and water is scarce.

Northern Plains Resource Council is a grassroots conservation and family agriculture group who works to protect Montana's water quality, family farms and ranches, and unique quality of life.

The Powder River Basin Resource Council works to preserve and enrich Wyoming's agricultural heritage and rural lifestyle and to conserve Wyoming's unique land, mineral, water, and clean air resources consistent with responsible use of those resources. Approximately 60% of its membership is involved in agriculture.

Dakota Resource Council is committed to preserving sustainable agriculture and natural resources in North Dakota. About 50% of DRC's members are farmers who rely on surface waters.

Oregon Rural Action works to promote social justice, agricultural and economic sustainability, and stewardship of the region's land, air and water.

Western Colorado Congress' community groups and members work together to create healthy, sustainable

communities, social and economic justice, environmental stewardship and a truly democratic society.

Community Association for Restoration of the Environment supports family farms in the State of Washington that operate in a sustainable manner, promoting both personal and economic health, stewardship of the land, and protection of air and water.

Concerned Citizens for Clean Water members in Texas and New Mexico work together to preserve and protect the Ogallala Aquifer, the major source of water for Eastern New Mexico, much of West Texas, and parts of Colorado, Oklahoma, Kansas, Nebraska, Wyoming, and South Dakota, from pollution and depletion.

Amigos Bravos works to return New Mexico's rivers and the Rio Grande watershed to drinkable quality appropriate for human contact; to see that natural flows are maintained and, where flows have been disrupted by human intervention, to seek regulation to protect and reclaim the river ecosystem by approximating natural flows; and to preserve and restore native riparian and riverine biodiversity.

The New Mexico Acequia Association works to protect and strengthen acequias through community education, community organizing and policy advocacy and whose members view water as the lifeblood of their communities because water brings them together as a community and water is essential to the continued survival of their way of life.

Headwaters (Oregon) works to rehabilitate watershed ecosystems and promote biological diversity through

promoting a just, sustainable economy, grassroots organizations, and education.

Oregon Natural Resources Council's mission is to aggressively protect and restore Oregon's wildlands, wildlife and waters as an enduring legacy.

Snake Valley Citizens' Alliance members reside in Utah and Nevada and work on issues regarding the export of groundwater resources from Snake and Spring Valleys. Depletion of groundwater through loss of surface water recharge further threatens the long-term economic basis and rural life of the valleys.

Northern California River Watch's purpose is to protect, enhance and help restore the surface and ground waters including all rivers, creeks and tributaries of Northern California.

Arizona Wildlife Federation works to educate, inspire, and assist individuals and organizations to value, conserve, enhance, manage, and protect wildlife and wildlife habitat. Support of enforcement of all state and federal conservation, game and fish laws is a priority. The AWF has promoted maximum outdoor recreation through scientific principles and the practice of multiple use of the public lands of Arizona.

Walker Lake Working Group works toward the preservation of Walker Lake, a closed-basin lake in western Nevada.

Wyoming Outdoor Council, the state's largest conservation organization, works to safeguard the state's spectacular national parks and protected areas, vast national forests and other public lands, world-renowned wildlife

and its habitat, blue-ribbon fisheries and air and water quality.

Iowa Farmers Union represents family farmers and is an affiliate of the National Farmers Union.

Mineral County businesses rely heavily upon the ability of residents and tourists to use Walker Lake for recreational purposes. Walker Lake is a closed-basin desert lake that supports a tremendous fishery.

SUMMARY OF THE ARGUMENT

The Sixth Circuit decisions should be affirmed based upon the comprehensive statutory structure of the Federal Water Pollution Control Act (commonly known as the Clean Water Act), the legislative history of the Act, and this Court's previous holdings under the Clean Water Act and its predecessor acts. While the Court need not reach the constitutional issues presented by the Petitioners, the Commerce Clause authority given to Congress to regulate pollution of the waterways in this country has been upheld by this Court based upon far less comprehensive statutes than the Clean Water Act, and thus Congress' authority to eliminate pollution under the Clean Water Act should similarly be upheld.[2]

[2] This brief is not intended to analyze in depth the plain language or legislative history of the Clean Water Act, nor the Commerce Clause tests of this Court. It is intended to highlight the comprehensive nature of the Clean Water Act and the connections of tributary streams and wetlands to the economic viability of small family farms and ranches and recreational interests unique to the West.

At the time that the Clean Water Act was passed, our Nation's waters were used for open sewage and industrial waste disposal. Congress recognized the overarching need to legislate federal protections to deal with rampant pollution. Let us not forget the setting: Lake Erie had been declared dead; the Cuyahoga River had caught fire; and waterways throughout the country were choked with pollution. Simple principles of hydrology that water and pollution flow downhill required that wetlands and inland streams could no longer be filled in or used for unregulated discharge if our Nation's waters were to be made healthy again and our economic structure was to be sustainable.

Tributary streams and adjacent wetlands act as do capillaries in the blood stream by regulating both the quality and quantity of water that reaches navigable-in-fact waters. Congress recognized that without these tributaries and wetlands, the perennial rivers would carry less, but more polluted, water, severely interfering with navigation and the channels of commerce supported by our Nation's waters. Without the capillary water systems, some perennial waters might themselves become intermittent streams, which would devastate local communities dependent on them.

Without minimum federal protections as established by the Clean Water Act, waters in all states, particularly those in the West, would be at peril of losing both water quality and quantity. Water users of the West, including family farmers and ranchers, recreationists, and outdoor enthusiasts, depend upon the important ecological and hydrological functions performed by wetlands and intermittent streams that are geographically distant from navigable-in-fact waters for their livelihood and overall

quality of life. Limiting Clean Water Act jurisdiction to navigable-in-fact waters and only immediate tributaries and adjacent wetlands would remove from regulation up to 96% of river miles from certain Western states. Such a ruling would allow the continued degradation and destruction of the Nation's waters in direct contradiction of the principles and structure of the Clean Water Act.

ARGUMENT

I. THE COMPREHENSIVE NATURE OF THE CLEAN WATER ACT AND PRIOR PRECEDENT GIVES CONGRESS THE POWER TO REGULATE INLAND WATERS TO PREVENT POLLUTION AT ITS SOURCE.

Almost 34 years ago, Congress comprehensively addressed our country's approach to controlling and, ultimately, eliminating water pollution, when it enacted wide-ranging reforms to the Federal Water Pollution Control Act. 33 U.S.C. § 1251, *et seq*. The vision of the 92nd Congress in enacting what is now known as the Clean Water Act stands as one of the legislative pinnacles in the history of this Congress and our country.

Congress clearly stated that its objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, Congress declared the ambitious goal of eliminating the discharge of pollutants into national waters by 1985. 33 U.S.C. § 1251(a)(1). It was the intent of Congress to give the Act's jurisdictional scope "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for

administrative purposes." S. Conf. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

The central issue in these two cases is the interpretation of the term "navigable waters" as it was intended by Congress. "Navigable waters" are defined in the Act as "waters of the United States . . . " 33 U.S.C. § 1362(7); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside Bayview*"). At the outset, it is important to put the present cases in the context of prior decisions of this Court. As noted in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), there was no question that Clean Water Act of 1972 was "'the most comprehensive and far reaching water pollution bill'" that Congress ever had passed. 451 U.S. at 317-318 (citations omitted). The term "waters of the United States" has been construed broadly to cover waters that are not navigable in the traditional sense. *See Int'l Paper Co. v. Oullette*, 479 U.S. 481, 486 n. 6 (1987) (citations omitted). This broad construction is consistent with Congress' intent to get away from potential limits imposed by the term "navigable waters" that were present in prior, ineffective statutes dealing with pollution of the Nation's waters. *Riverside Bayview*, 474 U.S. at 133; *see also* Rodgers, William H. Jr., Environmental Law, § 4.12 (1st ed. 1986) ("The extension of 'navigable waters' inland is unmistakable . . . ").

Accepting this inclusive construction, this Court further found "in *Milwaukee II*, that Congress intended the 1972 Act amendments to 'establish an all-encompassing program of water pollution regulation', and that congressional 'views on the comprehensive nature of the legislation were practically universal.' An examination

of [the Act of 1972] amply supports these views. The Act applies to all point sources and virtually all bodies of water." *Int'l Paper Co.*, 479 U.S. at 492 (citations omitted); *see also Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 179 (2001) ("*SWANCC*") (Stevens, J., dissenting) ("This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing 'a comprehensive program for controlling and abating water pollution.'" (Citing *Train v. City of New York*, 420 U.S. 35, 37 (1975)). The EPA has primary jurisdiction to work with the Corps to define waters of the United States and they have done so in identical language that reflects Congress' intent for a broad meaning of "waters of the United States." 33 C.F.R. § 328.3; 40 C.F.R. § 122.2. (defining waters of the United States "as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds ... "). This Court properly deferred to the Corps' (and necessarily the EPA's) interpretation of waters of the United States in *Riverside Bayview*, 474 U.S. at 133, and should do the same here. The wetlands at issue either contribute surface flow to tributary streams, and thus are themselves tributaries, or are, at the very least, directly adjacent to tributaries covered by the Act. In keeping with the Clean Water Act's intention to take into account the hydrological and ecological connectivity of all waters, EPA has acknowledged these principles since it began interpreting the statute, and it's determination is entitled to deference.[3] The Act remains as it was intended

[3] EPA's initial Policy Statement noted: "Freshwater wetlands support the adjacent or downstream aquatic ecosystem in addition to the complex web of life that has developed within the wetland environment. The relationship of the freshwater wetland to the subsurface

(Continued on following page)

in 1972 and as it was reinforced in its amendments of 1977.[4]

The reasons for comprehensive federal action to restore the condition of waters of the United States were manifold. *See* Rodgers, Environmental Law, § 4.1. Based on decades of water pollution problems and failed legislative actions, Congress recognized in 1972 that relying on states to fund, implement and enforce effective water pollution control (and resource protection) policies, without the financial, technical, and political assistance of a strong federal program was doomed to continued failure. States' rights were carefully maintained throughout the statute, however, including requirements of consultation and partnership. *See, e.g.*, 33 U.S.C. §§ 1251(b), (g), 1252(a), and 1253. Congress created a broad but flexible federal floor of clean water safeguards, a mandatory but innovative system for protecting the Nation's waters and the public's health. States are able to be more restrictive than federal law, but must at least meet the federal minimums in order to be allowed to administer the federal requirements. *See* 33 U.S.C. § 1342(b) (state requirements to administer § 402 national pollutant discharge elimination system permit program); 33 U.S.C. § 1344(g) (state requirements to administer § 404 dredge and fill permit program); and 33 U.S.C. § 1370 (state authority to be stricter than federal law).

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environment is symbiotic, intricate and fragile." Protection of Wetlands-EPA Policy Statement, 38 Fed. Reg. 10834 (1973).

[4] The 1977 amendments as ultimately passed, and according to Senator Baker, "'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'" *Riverside Bayview*, 474 U.S. at 136-37 (citations omitted).

While Congress found the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, (along with its successor statutes) to be inadequate to protect our Nation's waters from pollution, this Court has long construed even that statute broadly. *See, e.g., United States v. Alaska*, 503 U.S. 569, 578-83 (1992) (discussing the history of the Rivers and Harbors Act and quoting Justice Holmes: "'A River is more than an amenity, it is a treasure.'" *New Jersey v. New York*, 283 U.S. 336, 342 (1931)). In fact, thirty years before the far more comprehensive Clean Water Act was passed, Justice Douglas wrote for a unanimous court that

> there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river.

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941) (construing the Flood Control Act of 1938; flood control is now covered in 33 U.S.C. § 1252(a)). Justice Douglas went on to say: "For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries." *Id.* at 525-26. No more prophetic and directly applicable statement of law could be found to apply in the cases presently before this Court. As the holdings in *Alaska* and *Atkinson* dictate, the constitutional and jurisdictional underpinnings of Congress'

ability to regulate pollution and flood control of watersheds, including wetlands and tributaries that are part of the watersheds, in the far more comprehensive Clean Water Act should not be in question.

Consistent with this Court's recognition of Congress' right to legislate to protect watersheds, the protection of the wetlands at issue in *Rapanos* and *Carabell* provide important protections to the watersheds in which they exist. These protections include not only flood control, but also pollutant filtration, nutrient storage, and plant and wildlife habitat. *See* Malcolm Newson, Hydrology and the River Environment 153 (Oxford UK: Clarendon Press 1994) ("[W]etlands both reduce the river-flood hazard and help to purify polluted water."). Congress gave the EPA the power to protect the Nation's waters, at all levels throughout the watersheds, without being bound to navigability *per se*. EPA and the Corps are bound to account for the effects on all downstream waters, all of which eventually become navigable, either as rivers or as the territorial seas. The principles of protecting upstream tributaries and wetlands that provide multiple ecological and hydrological functions have been upheld by the Courts, and reaffirmed by Congress, for decades.[8]

The cases at issue here provide an opportunity for this Court to reaffirm the scope of protection of waters intended

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[8] This Court, again unanimously, has previously recognized that "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992) (citing 33 U.S.C. § 1288(b)(2)). Wetlands protection serves as part of the area-wide program and the agencies' implementation of this policy deserves deference by the Court.

by Congress and necessary to protect the quality of our Nation's waters. For over 60 years, this Court has upheld the constitutional ability of Congress to regulate watersheds in the context of water pollution laws. *See Atkinson*, 313 U.S. at 525. A holding to the contrary would violate the principle of *stare decisis* by overturning an extensive body of case law upholding Congress' power to regulate pollution of our Nation's waters. Furthermore, scientific studies have repeatedly confirmed the wisdom of Congress in legislating, and EPA and the Corps in administratively implementing, protections against pollution at the source.[6]

II. TRIBUTARY STREAMS AND WETLANDS ADJACENT TO OR CONNECTED WITH TRIBUTARY STREAMS ARE THE CAPILLARIES OF THE NAVIGABLE-IN-FACT ARTERIAL WATERWAYS.

While the webs of life found in aquatic systems may be complex, hydrological and ecological principles are relatively quite simple.[7] "It is clear from the ecological literature that isolated wetlands are not completely isolated. Interactions between such wetlands and other waters do occur hydrologically, through ground-water and intermittent surface-water flows, and biologically through dispersal of plants and animals." Scott G. Leibowitz,

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[6] The current Clean Water Act rules, proposed in 1975 and finalized in 1977, fully reflect Congress' intent, by extending protection to those intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce . . . " 33 C.F.R. § 328.3(a)(3).

[7] The eminent Theodor Geisel, known to all as Dr. Seuss, has captured for all ages this concept well. In *McElligot's Pool*, he shows that a fishing boy is no fool. Even a small pond with little action is likely connected downstream where fishing should gain more traction. Dr. Seuss, McElligot's Pool (Random House 1947).

Isolated Wetlands and Their Functions: An Ecological Perspective, 23 WETLANDS 517, 528 (2003). Protecting the integrity of hydrological and ecological principles is recognized and anticipated throughout the Clean Water Act, which is founded on the understanding of the need to protect our Nation's waters from pollution.

As the Court reasoned in *Riverside Bayview*, both EPA and the Corps appropriately sought to protect wetlands adjacent to waters of the United States "as integral parts of the aquatic environment . . . " *Riverside Bayview*, 474 U.S. at 134, 135-139. In this context, the Court recognized that the regulation of wetlands by the Corps was properly "'implementing congressional policy rather than embarking on a frolic of its own.'" *Id.* at 139 (quoting *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 375 (1969)).

Just as this Court recognized that the Corps deserves deference over regulation of adjacent wetlands as a class, the Corps and EPA regulations over wetlands that exist within upland areas and upland tributaries similarly deserve deference. *See Riverside Bayview*, 474 U.S. at 131 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)); 135 n.9 ("If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand."). The agencies recognize and understand the role of surface waters, whether they be wetlands or streams, intermittent or perennial, to provide flow (and other important contributions) to navigable waters. This Court should not interfere with the agencies' scientific expertise.

The scientific literature further reinforces the agencies' regulatory system. Many perennial streams get significant contributions from ground waters that are recharged by wetlands and tributary streams. Flow contributions occur in two primary ways: through surface contribution and through groundwater recharge that ultimately feeds navigable waters downstream. *See, e.g.*, Thomas C. Winter & James W. LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS 532, 533 (2003) ("Isolated lakes and wetlands (for brevity, wetlands will be used herein to represent lakes and wetlands) located in this type of setting are equivalent to shunt-bars in the flow field. That is, ground water discharges to the wetland on the up-gradient side and the wetland recharges ground water on the down-gradient side []. Wetlands in this type of hydrogeologic setting are not isolated because the ground-water flow field is a hydrologic continuum."); *Id.* at 538 ("[I]t can be said that nearly all wetlands are connected to some degree through either surface water or ground-water flow systems and that, over time, impacts in one part of a hydrologic system will be felt in other parts."); Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS 541, 541-44, 547-48 (2003). In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), regulation of wetlands adjacent to tributaries is crucial.

In *Carabell*, the wetlands are not isolated either in terms of proximity or hydrological or ecological connectivity. First, the wetlands are "bordering, contiguous, or adjacent to" a tributary to a navigable water. 33 C.F.R. § 328.3(c). Second, while the record is not clear just how much the wetlands are hydrologically connected underground, this

Court has already deferred to the agencies' decision to regulate wetlands as a class. *Riverside Bayview*, 474 U.S. at 135 n.9 ("That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment" because the Corps has the discretion to issue a permit). The Corps should not be required to expend extensive resources scientifically affirming a connectivity on a case-by-case basis that is a generally accepted scientific fact. As one scientist summarizes:

> To have an impact on water quality in other ecosystems, isolated wetlands would need to be hydrologically connected to them. Several studies (e.g., McNamara et al. 1992, Winter and Rosenberry 1995, Rosenberry and Winter 1997, Podniesinski and Leopold 1998, Winter et al., 2001, Winter and LaBaugh 2003) have demonstrated that isolated wetlands have complex but direct hydrologic interactions with other wetlands and uplands. Based on the studies just cited, we assume that most isolated wetlands are, in fact, not hydrologically isolated from other waters and wetlands and, thus, have the potential to impact water quality in downstream ecosystems.

Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 542. A wetland adjacent to a tributary is by no means isolated.[8]

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[8] Wetlands were presumed by EPA in 1973 to be hydrologically connected, either through surface or underground connections. *See* note 3, *supra*. This presumption is overwhelmingly confirmed in the scientific literature. *See, e.g.*, Winter & LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS at 533-34, 538 (stream or wetland may appear isolated by surface characteristics but it

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If an applicant believes that a wetland is not hydrologically connected, then the burden should be on the applicant to prove there is no hydrological connection. This would then be *one* factor, albeit not a determinative factor, for the agency to consider when reviewing an application for a permit to fill or alter an existing wetland area. *SWANCC* does not require a different result because it dealt only with the issue of the Migratory Bird Rule relied upon by the government. In that case, this Court found that the Migratory Bird Rule *by itself* was not enough to give Clean Water Act jurisdiction to the courts. *SWANCC*, 531 U.S. at 174. In the two cases presently at issue, there are numerous factors that provide Clean Water Act jurisdiction, including hydrological and ecological connectivity, adjacency to tributaries of navigable waters, flood control, pollution filtration[9], *and* migratory bird habitat. In *Rapanos*, there are uncontested surface water connections

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is not hydrologically isolated from a groundwater perspective); Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 547-48 ("Isolation is a relative term and not a very good term from an ecosystems perspective. Most isolated wetlands appear to be continuously or intermittently linked hydrologically to other ecosystems, and disturbances would result in negative effects on water quality within and external to the wetlands.").

[9] Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 543-44 ("Prairie pothole wetlands have also been shown to improve water quality and to efficiently retain nutrients (e.g., Magner et al. 1995). Many pothole wetlands have enriched nutrient conditions as a result of agricultural inputs (Neely and Baker 1989), and enrichment of N [nitrogen] and P [phosphorus] in surface waters often results in nutrient enrichment of interstitial water. Unaltered prairie pothole wetlands thus have a high potential for downstream discharge of nutrients if they are connected to other potholes by surface or groundwater discharges and drainage or ditching has the potential to significantly increase the amounts of nutrients discharged to downstream systems. Winter et al. (2001).").

between the wetlands and tributaries that eventually reach navigable-in-fact waters, *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004), while in *Carabell* the wetlands likely have intermittent surface connections with tributaries in addition to their adjacency to the tributaries. *Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 705-06, 708 (6th Cir. 2004). Fundamentally, since the wetlands at issue are not isolated, the narrow holding in *SWANCC* is not applicable to these cases.

Perhaps determinative of its case, Carabell concedes that "[i]n general, the federal government may regulate the intrastate non-navigable tributaries of navigable waters but only insofar as it is necessary to protect the integrity of the aquatic system that constitutes the navigable waters." Carabell Brief at 19 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-26 (1940)). Carabells' counsel also concedes that Congress had exercised proper powers by enacting the Clean Water Act because "water moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." Carabell Brief at 24 (citing *Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742)). These two concessions, along with deference to the agencies' regulations which are intended to protect the integrity of the aquatic system, further reinforced by the scientific literature, give this Court all it needs to affirm the Sixth Circuit opinions.

Carabell further argues that federal deference to the states over pollution is required because Congress intended to defer to state water laws. Carabell Brief at 32. The Clean Water Act does no such thing. Congress passed the statute to deal with the failure of states to be able to

address the severe pollution of interstate waters that was at least in part fed by intrastate waters. Congress provided a federal minimum under which the States could not go. *See* 33 U.S.C. § 1370 (no restrictions less stringent than federal law). As earlier noted, Congress recognized the need for federal/state cooperation, but also saw a dire need to address the problem at the federal level.[10] While Congress opted not to limit states' rights to address water *quantity* use, 33 U.S.C. § 1251(g), it did impose on the states an overarching scheme to address water *quality* issues. *See, e.g.*, 33 U.S.C. § 1312. Inclusion of wetlands and tributaries under Clean Water Act jurisdiction provides the perfect opportunity to regulate flows to maintain the integrity of the Nations' waters. *See* 33 U.S.C. § 1251(a). Addressing water pollution of tributaries and adjacent wetlands that act as the capillaries for the larger bodies of water is essential to protecting the integrity of all of the Nation's waters.

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[10] Some states, such as Idaho and New Mexico, have not created legislation protecting waters of the state from pollution and thus have not been delegated authority to administer the Clean Water Act. Many states, including Idaho, Montana, Colorado, Utah, and New Mexico also have various forms of laws in place prohibiting them from being stricter than federal laws that prevent pollution of surface waters. *See, e.g.*, State Environmental Resource Center, "Issue: 'No More Stringent' Laws," available at http://www.serconline.org/noMoreStringent.html (last visited January 6, 2006); Jeanne Christie, "Overview of State Efforts of [sic] Close the Gaps in Jurisdiction – Status and Trends in State Wetland Programs," available at http://www.aswm.org/calendar/legal/christie.pdf, slide 12 (last visited January 6, 2006). Thus, if federal jurisdiction is taken away, there will be no protections for waters of the United States in many areas of the country.

III. IN THE WEST, TRIBUTARY STREAMS, AND THE WETLANDS AND OTHER WATERS THAT HELP FEED THEM, ARE ESSENTIAL TO ECONOMIC SURVIVAL AND QUALITY OF LIFE.

In the West, the contribution of tributary streams, most often intermittent streams, and wetlands to navigable waters is obvious. Perennial surface waters are relatively rare in the West compared to the more ubiquitous waters of the East. For example, the percentage of Northeast river miles that are non-perennial are as low as 30%, while the non-perennial rivers in the interior West account for 76% of river miles. *See* Comments of the Western Water Alliance to the U.S. Environmental Protection Agency, Docket ID OW-2002-0050, April 16, 2003, Table 2, at pages 9-10 (attached hereto as Appendix 2). In Arizona, non-perennial rivers account for 96% of all river miles in the state. *Id.*

Using a different gauge, the Corps of Engineers' navigable rivers designations under Section 10 of the Rivers and Harbors Act, only 1.73% of the river miles in the entire West are navigable-in-fact. *Id.* at Table 1 (also attached hereto as Appendix 1). In New Mexico, the percent of navigable rivers is only 0.02%; in Nevada the number is only 0.10%.[11] *Id.* In eleven of the fifteen Western

[11] In the case of Mineral County, Nevada, one of the amici herein, the county government is especially interested in making sure that intermittent streams and wetlands that provide water for Walker Lake are protected. Walker Lake is a unique, closed-basin desert lake that provides substantial sport and recreational economic benefit to Mineral County businesses. It is one of only five relatively fresh, deep water desert lakes in the world supporting a substantial fishery. Pyramid Lake, also in Nevada, and three lakes in Central Asia are the others. *See* "Save Walker Lake, How Can It Be Saved?" available at http://

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states listed in the table, fewer than 1% of the rivers are navigable-in-fact. *Id.* The already arid West would be dramatically impacted by any reductions in Clean Water Act federal jurisdiction. Intermittent streams would be allowed to be used for waste disposal, thus imperiling perennial streams during times of connected flow. The loss of wetlands, already few, would lead to further depletion of tributaries[12] and loss of critical habitat for species dependent on the scarce water and plants provided by such oases.

Courts in the West, both district and appellate, have consistently upheld federal jurisdiction over non-perennial tributary waters. *See, e.g., Quivira Mining Co. v. United States Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir. 1985) (affirming EPA's determination that CWA permit required for discharges into surface arroyos that, during storms, channeled rainwater both directly to streams and into underground aquifers that connected with such streams); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) ("[E]ven tributaries that flow intermittently are 'waters of the United States'."). The reasoning for including intermittent tributaries within the jurisdiction of the Act is clear: "'[A]s long as the tributary would flow into the navigable body [], it is capable of

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web0.greatbasin.net/~frankly/walker.html (last visited January 6, 2006).

[12] The capacity of wetlands to temporarily store and later release water plays a critical role in supplying water to streams and rivers during dry seasons of the year. *See* Virginia Carter, *Technical Aspects of Wetlands: Wetland Hydrology, Water Quality, and Associated Functions*, United States Geological Survey Water Supply Paper 2425, available at http://water.usgs.gov/nwsum/WSP2425/hydrology.html (last visited January 10, 2006); United States EPA, *Functions and Values of Wetlands*, EPA 843-F-01-002c (Sept. 2001) available at www.epa.gov/owow/wetlands/pdf/fun_val.pdf (last visited January 10, 2006).

spreading environmental damage and is thus a 'water of the United States' under the Act.'" *Id.* at 534 (quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997)).

Intermittent and ephemeral streams feed downstream perennial waters by overland flow during times when streams carry groundwater contribution, snowmelt, and other precipitation runoff. Intermittent and ephemeral streams also provide a means to filter pollutants along the way. At other times streams may disappear into the ground as ground water recharge or reemerge as whole rivers.[13] Virtually all rivers gain water from tributaries as they proceed downstream, but in areas of the West, streams or rivers dry up at times either from ground infiltration, evaporation, over appropriation, or a combination of these factors. These so-called "losing reaches" still require the same protections as streams with constant surface connections. Without them, ground water would be further depleted, thereby reducing, or in some cases eliminating, ground water used for supplying people with drinking water and irrigation water for crops and livestock. These losing streams also may again "daylight," either through springs or from being fed by other downstream tributaries. If protections are taken away from any parts of these streams they might never again see the light of day. The elimination of federal protections for such waters will ultimately lead to lower flows in the downstream

[13] The famous McKenzie River in Oregon actually disappears underground through a lava field only to reemerge some two miles downstream. *See* "A Tale of Two Rivers" available at http://www.4j.lane.edu/partners/eweb/ttr/mckenzie/cdr.html (last visited January 2, 2006).

perennial waters that rely on ground water flow to make them perennial. In other words, without these upland waters, some perennial streams might themselves become intermittent streams.

In a series of Clean Water Act enforcement cases where the plaintiff group, CARE, one of the amici on this brief, consisted of life-long residents, mostly farmers and orchardists, in the Yakima Valley in south-central Washington, industrial dairies were using natural drains and ditches[14] to dispose of manure-contaminated wastewater and to convey it to holding pits, as well as over-irrigating with manure wastewater that then ran off into the natural drains. In some cases, the drains are intermittent or ephemeral streams. They are all tributaries to the Yakima River, located two to five miles downstream from the facilities. *See Community Ass'n for Restoration of the Env't ("CARE") v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1138, 1144 (E.D. Wa. 1999) (liability phase), *aff'd*, 305 F.3d 943, 947 (9th Cir. 2002). These are just the types of waters that Petitioners and their amici argue should not receive Clean Water Act protections, even though they contain water that eventually flows into a navigable water body.

One of the CARE cases involved the then-largest dairy in the State of Washington (over 5,000 milking cows contained in pens totaling about 50 acres).[15] High fecal

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[14] Many ditches are actually natural waters that have been diverted, straightened, and ditched to promote agriculture, align with property boundaries, or drain wetlands.

[15] Large industrial dairies, with over 700 confined mature dairy cows, are called Concentrated Animal Feeding Operations, or CAFOs,

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coliform (bacteria associated with animal manure that present public health risks) readings were found in the drain that ran through the dairy's property. *See CARE v. Henry Bosma Dairy*, 2001 WL 1704240 at *10 (E.D. Wa. 2001) (penalty phase), *aff'd*, 305 F.3d 943. The drain, which at times was only inches deep, carried natural run-off and man-induced discharges that ran for miles through many people's properties to the Yakima River. *CARE*, 65 F. Supp. 2d at 1138, 1144. The drain became part of the dairy's NPDES permit and was identified in the permit as waters of the State of Washington.[16] *Id.* at 1145. Another drain next to which manure waste was placed ran about seven miles through farmland to the Yakima River. *Id.* at 1150. These drains highlight the situation that exists in much of the arid West. While the drains are not navigable themselves, they contribute significant quantities of water (and at times pollutants) to the waters downstream, in this case the Yakima River which flows into the definitively navigable-in-fact Columbia River.

These drains and ditches may be considered point sources where they are entirely within one person's property, but when they flow through multiple properties and give rise to opportunities for many individual discharges

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and are defined as point sources under the Clean Water Act. 33 U.S.C. § 1362(14).

[16] The Washington definition directly relies upon the federal definition of waters of the United States. "'Surface waters of the state' means all waters defined as 'waters of the United States' in 40 C.F.R. § 122.2 that are within the boundaries of the state of Washington. This includes lakes, rivers, ponds, streams, inland waters, wetlands, ocean bays, estuaries, sounds, and inlets.'" Wash. Admin. Code § 173-220-030(21). It is the Clean Water Act that gives the state authority to regulate the discharges as part of its federally approved program.

to contribute waste, they must be regulated as waters of the United States. Otherwise, there would be no means to eliminate the pollution that they carry to navigable waters. In either case, the Clean Water Act gives the EPA jurisdiction to regulate these sources. *See* 33 U.S.C. § 1362(14) (definition of "point source"); (7) (definition of "navigable waters"). EPA uses its discretion as to how to address the drains and ditches. The Act also has built-in exemptions from discharge limitations for limited types of activities, including "normal farming . . . and ranching activities such as plowing, seeding, [etc.]. . . . " 33 U.S.C. § 1344(f)(1)(A). Filling of wetlands for commercial purposes, as in the Petitioners' case facts, or for discharge of wastes into drains as exemplified in the *CARE* cases, do not fit within the narrow exceptions to permitting.

Another example involves a dairy in Idaho. In that case the dairy (over 2000 cows) was located on a plateau above two adjacent ranches. The plaintiff was the Idaho Rural Council, one of the amici herein, whose members included the ranch families. One ranch was homesteaded by the Butler family nearly a century ago and the family still ranches that property. Each ranch was dependent on springs whose source was the shallow aquifer that ran beneath the industrial dairy. The operator of the dairy had for years simply bulldozed dead animals, calf fetuses, medical waste, syringes, and manure into a ravine where one of the springs surfaced. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1176 (D. Id. 2001). The spring ran down through one rancher's property (and was used for watering free-ranging livestock) into an irrigation canal that led to a nearby creek, a downstream recreational reservoir, and then to the Snake River, a navigable water. *Id.* at 1179. As the court itself noted, "whether pollution is

introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams." *Id.* at 1180.

The Idaho case also involved wet areas on slopes known as "seeps." These seeps are located in ravines and form the beginning of the surface waters. *See* Whigham & Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS at 544 ("Slope wetlands form where there is a discharge of ground water to the land surface (Brinson 1993). The slope of the land surface associated with this wetland class may be gentle or steep, and the sources of water are predominantly ground water (shallow or deep) and precipitation. Wetlands in this category are also called 'seeps', and they can support a wide variety of wetland plant communities (Podniesinski and Leopold 1998, Crow et al. 2000, Winter et al. 2001). Wetlands associated with seeps have been shown to be important sites for regional biodiversity because they often contain rare species (Weakley and Schafale 1994)."). Springs such as the ones described are used not only by the people who have homesteaded the areas generations ago, but also by wildlife that depend on them in these arid regions.

These small, intermittent streams are critical to the economies of the arid West. If they were to be removed from federal jurisdiction, the types of wanton pollution exemplified above would potentially go unchecked and would certainly cause further impairment to our Nation's waters, in violation of the Clean Water Act's stated goal of eliminating pollution. *See* 33 U.S.C. § 1251(a)(1). Each polluter must be responsible for the discharges he creates

in order for the point source prohibition scheme to be effective.

In New Mexico, amici New Mexico Acequia Association members depend on intermittent streams to fill their acequias, which have been used for generations to irrigate crops and water livestock.[17] Pollution discharged into these tributaries contaminates the acequias and the larger bodies of water which receive waters not used for agricultural purposes. If the tributaries are allowed to be destroyed, it would reduce the already limited quantity of surface water upon which people and wildlife depend.

Many of the members of the amici organizations on this brief are ranchers or farmers whose direct livelihood depends upon protection of the intrastate intermittent streams, adjacent wetlands and similar and unique waters that provide the arid West with its lifeblood – water. This precious water supports their economic base in addition to providing sustenance for wildlife and plants that enhance the quality of life and the interests of all amici.

Destruction or pollution of seasonal streams, small springs, wetlands and other waters inevitably leads to greater degradation and pollution of the largest and most treasured of our nation's waters, including the Great Lakes and St. Lawrence River, Chesapeake Bay, Everglades, Gulf of Mexico, Puget Sound, and the Mississippi,

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[17] An acequia is a community-based system of irrigation and water governance and also refers to the community of farmers that cooperatively maintain the ditch and share water through custom and tradition. Acequias formed the basis for settlement of New Mexico's Indo-Hispano communities between two and four hundred years ago and continue to be vital to the cultural and economic survival of the traditional communities of New Mexico.

Ohio, Illinois, Tennessee, Hudson, Missouri, Yellowstone, Snake, Columbia, Colorado and Rio Grande Rivers, to name just a few. The Clean Water Act prohibits such degrading activities and this Court should uphold the Clean Water Act and its regulatory definition of "waters of the United States."

CONCLUSION

The decisions of the Sixth Circuit in *Rapanos* and *Carabell* should be affirmed in their entirety.

Respectfully submitted,

CHARLES M. TEBBUTT
Counsel of Record
Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401
541-485-2471

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Table 1
Navigable River and Stream Mileage in the West

State	Total Miles	COE Sec. 10 Navigable	Notes	Percent Navigable
Arizona	90,373	280	a, b	0.31%
California	211,513	1389.9	a, b, c, d	0.66%
Colorado	107,403	39	b	0.04%
Idaho	115, 595	187	e	0.16%
Kansas	134,338	314	a, h	0.23%
Montana	176,750	1,304	a, h	0.74%
Nebraska	81,573	389	a, h	0.48%
Nevada	143,578	145	a, b	0.10%
New Mexico	110,741	20	a, i	0.02%
North Dakota	54,373	887	a, h	1.63%
Oregon	114,823	1,410	e	1.23%
South Dakota	9,937	887	h	8.93%
Utah	85,916	201	b	0.23%
Washington	70, 439	1,365	g	1.94%
Wyoming	108,767	91	a, h	0.08%
Western Total	1,616,119	24,600		1.73%

App. 1

Notes:

Total miles from 1998 EPA 305b report. http://www.epa.gov/305b/98report/appenda.pdf
Navigability determined by Corps of Engineers for purposes of Section 10 of the Rivers and Harbors Act

a. Some navigable mileage estimated.
b. Nav. Rivers: Sacramento Dist. http://www.spk.usace.mil/cespk-co/regulatory/navigable.html.
c. Nav. Rivers: San Francisco District Spreadsheet, 8/2/71
d. Nav. Rivers: LA District Pers. Comm. 2/18/03
e. Nav. Rivers: Walla Walla Dist., http://www.nww.usace.army.mil/html/offices/op/rf/Pamphlet/webpam.htm
f. Nav. Rivers: Portland District, Navigable Riverways, Oregon , October 1993
g. Nav. Rivers: Seattle District, Navigable Waters, Washington May 5, 2000
h. Nav. Rivers: Section 10 Waters of the Omaha District, undated.
i. Nav. Rivers: Albuquerque District, http://www.spa.usace.army.mil/reg/brochure4.htm

Table 2
Perennial and Nonperennial River Miles by Region

Region	Jurisdiction	Total Miles	Perennial Miles	Nonperennial Miles	Notes	Percentage Nonperennial	Regional Percentage Nonperennial
Midwest	Illinois	87,110	30,246	54,741		63%	
Midwest	Indiana	35,673	20,365	15,308	a	43%	
Midwest	Iowa	71,665	26,630	42,957		60%	
Midwest	Michigan	51,438	28,719	22,719	a	44%	
Midwest	Minnesota	91,944	32,196	59,748	a	65%	
Midwest	Missouri	51,978	21,978	30,000		58%	
Midwest	Ohio	29,113	27,825	1,288		4%	
Midwest	Wisconsin	57,698	32,010	23,777		41%	
Midwest		476,619	219,969	250,538			53%
Northeast	Connecticut	5,830	5,484	344		6%	
Northeast	Delaware	2,509	1,778	405		16%	
Northeast	Maine	31,752	23,457	8,295	a	26%	
Northeast	Massachusetts	8,229	6,808	1,421	a	17%	
Northeast	New Hampshire	10,881	8,636	2,238		21%	
Northeast	New Jersey	6,450	6,450	0	a	0%	
Northeast	New York	52,337	46,266	5,075		10%	
Northeast	Pennsylvania	83,260	39,179	44,081	a	53%	
Northeast	Rhode Island	1,392	887	505	a	36%	
Northeast	Vermont	7,099	6,958	141	a	2%	
Northeast		209,739	145,903	62,505			30%
Pacific	California	211,513	64,438	124,615		59%	
Pacific	Oregon	114,823	51,695	59,299		52%	
Pacific	Washington	70,439	39,483	30,956	a	44%	
Pacific		396,775	155,616	214,870			54%
South	Alabama	77,274	47,072	30,170		39%	
South	Arkansas	87,617	28,408	53,465		61%	
South	Florida	51,858	22,993	2,956		6%	
South	Georgia	70,150	44,056	23,906		34%	
South	Kentucky	49,105	34,152	14,953	a	30%	
South	Louisiana	66,294	32,955	20,667		31%	
South	Maryland	17,000	12,343	2,104		12%	
South	Mississippi	84,003	26,454	54,862		65%	
South	North Carolina	37,853	45,571		b	0%	
South	Oklahoma	78,778	22,386	55,413		70%	
South	South Carolina	29,898	24,115	5,783	a	19%	
South	Tennessee	61,075	53,872	7,203	a	12%	
South	Texas	191,228	40,194	144,603		76%	
South	Virginia	49,350	49,350	0		0%	
South	West Virginia	32,278	21,114	11,164		35%	
South		983,761	505,035	427,249			43%
West	Kansas	134,338	23,731	110,225		82%	
West	Nebraska	81,573	17,783	62,958		77%	
West	North Dakota	54,373	5,483	48,890		90%	
West	South Dakota	9,937	1,932	8,005		81%	
West	Arizona	90,373	3,528	86,845		96%	
West	Colorado	107,403	29,553	77,850	a	72%	
West	Idaho	115,595	54,948	52,704		46%	
West	Montana	176,750	53,221	116,608		66%	
West	Nevada	143,578	14,988	126,257		88%	
West	New Mexico	110,741	8,682	99,332		90%	
West	Utah	85,916	16,457	65,442		76%	
West	Wyoming	108,767	35,151	73,616		68%	
West		1,219,344	265,457	928,732			76%
National	**Total**	3,286,238	1,291,980	1,883,894			57%

Notes:
Total, Perennial and Nonperennial (except as noted) from 1998 EPA 305b report.
http://www.epa.gov/305b/98report/appendx.pdf

a Nonperennial milage not reported, calculated by subtracting Perennial from Total
b Nonperennial mileage not meaningful/data inconsistency